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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~358.~~ 89.

BRAINARD H. WARNER AND LOUIS D WINE, TRUSTEES; FRANK L. FREEMAN, LAURA R. GRAY, AND JAMES P. LOWE, APPELLANTS,

vs.

DAVID C. GRAYSON, TRUSTEE; MICHAEL SHEA, WILLIAM J. McCLURE, ET AL.

No. ~~359.~~ 90.

H. MAURICE TALBOTT AND FRANK I. WOOD, APPELLANTS,

vs.

DAVID C. GRAYSON, TRUSTEE; MICHAEL SHEA, WILLIAM J. McCLURE, ET AL.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 26, 1904.

(19,458 & 19,459.)

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In the Court of Appeals of the District of Columbia.

FRANK I. WOOD ET AL., Appellants,
vs.
DAVID C. GRAYSON, Trustee, *et al.*
No. 1304.

a Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee; MICHAEL Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, and Morse, Williams & Co., Complainants,
vs.
FRANK I. WOOD, H. MAURICE TALBOTT, Bernard A. Duke, Nicholas T. Haller, Brainard H. Warner, Louis D. Wine, Frank L. Freeman, Laura R. Gray, James P. Lowe, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, and The First National Bank of Gaithersburg, and John C. Heald, Defendants.
No. 20773. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill, &c.*

Filed September 6, 1899.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee; MICHAEL Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, and John M. Pruett, Complainants,

vs.

FRANK I. WOOD, H. MAURICE TALBOTT, Bernard A. Duke, Nicholas T. Haller, Brainard H. Warner, Louis D. Wine, Frank L. Freeman, Laura R. Gray, James P. Lowe, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, and The First National Bank of Gaithersburg, and John C. Heald, Defendants.

Equity Doc., No. 20773.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainants show to the court as follows:

1. The complainants are, all, residents of the city of Washington, District of Columbia. The complainant David C. Grayson sues as trustee, as hereinafter shown, and the remaining complainants sue in their own right, as parties secured by a second deed of trust on the premises known as the Victoria flats, as hereinafter shown.

2. The defendants H. Maurice Talbott and Alice S. Hill are residents of Rockville, in the State of Maryland; the defendant
2 The First National Bank of Gaithersburg is a body corporate, having its habitat in Gaithersburg, in the State of Maryland, and the remaining defendants are residents of the District of Columbia. The defendants Frank I. Wood, H. Maurice Talbott, Bernard A. Duke and Nicholas T. Haller are sued as persons owning or claiming to own, the said Victoria flats, or interests therein. The defendants Brainard H. Warner and Louis D. Wine are sued as trustees, under a first deed of trust upon the said premises, as hereinafter shown, and the defendants Frank L. Freeman, Laura R. Gray and James P. Lowe are sued on behalf of themselves and others, too numerous to be made parties hereto, as holders of the one

hundred and eighteen promissory notes secured by the said first deed of trust. The defendants Frederick W. McReynolds and James H. Meriwether are sued as trustees under a first deed of trust upon certain adjacent premises, as hereinafter shown and the said Alice S. Hill, Charles M. Carter, Charles L. Frailey, and the First National Bank of Gaithersburg are sued as the holders of the promissory notes secured by the said last named deed of trust; and the defendant H. Maurice Talbott is, also, sued as claiming to hold two of the said last named promissory notes. The defendant John C. Heald is sued as trustee, as hereinafter shown.

3. Heretofore, to wit, on the 13th day of January, 1897 the defendant Alice S Hill, being the owner of lots one (1) and two (2) in block forty-five (45), in W. C. Hill's subdivision of the Middle Grounds of Columbian university, now called University Park, as said
3 subdivision is recorded in the office of the surveyor of the District of Columbia in County Book Six (6), at page 5, conveyed the same to the defendant Nicholas T. Haller by fee simple deed, duly recorded in Liber No. 2180, at folio No. 336, of the land records of the District of Columbia. Thereafter the said defendant Haller encumbered said property by two deeds of trust, as follows:

By deed of trust to the defendants Brainard H. Warner and Louis D. Wine, trustees, recorded in Liber 2180, at folio 340, of the said land records, whereby the said Haller conveyed to the said Warner and Wine the east one hundred and twenty-four (124) feet, by the width thereof, of the said lot one (1), and the north forty-five (45) feet, by the depth of one hundred and twenty-four (124) feet, of lot two (2) to secure the one hundred and eighteen (118) promissory notes of the said Nicholas T. Haller, aggregating seventy-five thousand dollars ($75,000.00), and payable five years from the 22nd day of January, 1897, the date of the said encumbrance, with interest at the rate of six per centum per annum, payable semi-annually; and

By a deed of trust upon the remaining portion of the said lots one (1) and two (2) to defendants Frederick W. McReynolds and James H. Meriwether, viz: upon the west twenty-six (26) feet, by the width thereof, of the said lot one (1), and upon all of the said lot two (2) except the north east forty-five (45) feet thereof, by a depth of one hundred and twenty-four (124) feet, to secure the six promissory notes of the said defendant Haller, four of the said notes being
4 for two thousand dollars ($2,000.00) each and two of the said notes for two thousand, one hundred and sixty-five dollars ($2,165.00) each, two of the said notes being payable at one year, two at two years, and three at three years from their date, viz: from the said 22nd day of January, 1897.

The said one hundred and eighteen promissory notes, secured by the first named of the said deed of trust, are distributed among and held by a very large number of persons, too numerous to be made parties hereto, and who are for the most part unknown to the complainants; but the defendants Frank R. Freeman, Laura R. Gray and James P. Lowe are among the said holders, and are sued on behalf of themselves and others in like situation.

4. Thereupon the said Nicholas T. Haller proceeded to erect upon that portion of the said lots covered by the deed of trust to the defendants Warner and Wine, a large apartment house, known as the Victoria flats, the same having a frontage of one hundred (100) feet by a depth of eighty-seven (87) feet, set back upon the rear of the said lots, so that the western exposure of the said building was, or was intended to be, upon the rear building line of the said property, and the southern exposure, also, being erected upon the southern building line of the said portion of the said lots so as aforesaid covered by the said deed of trust to the defendants Warner and Wine; in which western and southern exposure of the said building, however, the said defendant Haller inserted a large number of windows, to wit,
5 about forty windows on the western exposure of the said building, and about sixteen windows on the southern exposure of said building, all of which windows are absolutely necessary to the proper and successful use, management and enjoyment of the said building, as, without them, a large number of apartments therein would be deprived of necessary light and air, and would be untenantable and useless. The dependence of the said building for light and air upon the portions of the said lots one (1) and two (2) to the west and south of it, excepted from the said deed of trust to the said Warner and Wine, as the complainants are informed and believe, and therefore aver, arose partly out of the fact that the said Nicholas T. Haller was the owner of the said adjacent property, subject to the small trust to the defendants Meriwether and McReynolds, and, also, and principally, out of the fact that the title of the defendant Alice S. Hill, so acquired by him, was subject to certain building restrictions, unknown to him at the time of its purchase, which rendered him unable to place his said building in the center of the site originally designed for it by him. And the complainants further aver that, in view of the said situation, an agreement was entered into between the said defendant Haller and the holders of the promissory notes secured by the deed of trust to the defendants McReynolds and Meriwether, by which, upon payment by said Haller or his assigns, of four thousand dollars ($4,000.00) of the said encumbrance upon the said adjacent portion of the said lot, a
6 strip of ground ten feet wide, and extending along the entire western and southern exposures of the said Victoria flats, should be released to the said Nicholas T. Haller, and be and become a part of the said Victoria Flats property.

The complainants file herewith a plat of the said lots 1 and 2, the parts thereof in blue representing the portions thereof described in the deeds of trust to the said Wine and Warner, and to the said Grayson and Heald, and the parts in red indicating the said ten foot strip, which plat is marked Exhibit B, is prayed to be read as part hereof.

5. The complainants to this bill, other than complainant David C. Grayson in his capacity as trustee, are all persons who contributed labor and materials to the construction of the said Victoria flats under contract with the defendant Nicholas T. Haller, which de-

fendant, upon completion of the said building, being unable to pay them the sums of money due for their materials and labor, they were about to file mechanics' liens against the property for the amount of their several claims. At this time, the said defendant had placed a second deed of trust upon the said Victoria Flats portion of the said premises to the defendant John C. Heald and Clarence B. Rheem, to secure a debt of ten thousand dollars ($10,000.00) contracted by the said Haller subsequently to the commencement of the said building, and which encumbrance, therefore, would have been postponed to the claims of these complainants and others in like situation; but it being represented to them that the said encumbrance represented moneys borrowed by the said Haller and used in the construction of the said building,
7 and desiring to be equitable and fair toward the parties who had loaned the same, these complainants and others in like situation consented that the said second deed of trust might be released, which was accordingly done, and a new second deed of trust executed, and placed on record, conveying the same property to secure these complainants and others, contractors and material men, and the said ten thousand dollars ($10,000.00) so as aforesaid secured by the said deed of trust to Heald and Rheem; and, accordingly, on or about the 20th day of December, 1897, the said defendant Haller executed a deed of trust upon the said Victoria Flats premises, which was recorded in Liber 2291, at folio 133, of the said land records, to the said complainant David C. Grayson and to the defendant John C. Heald, as trustees, to secure the ninety-six (96) promissory notes of the said defendant Haller, all dated December 20, 1897, aggregating $30,087.69, bearing interest thereon at six per centum per annum, and to secure further the twelve other promissory notes of the said defendant Haller, of the same date, aggregating $10,350.00, with interest at the same rate; the first ninety-six of which notes were distributed among the complainants hereto and others in like interest, as representing the indebtedness of the said Haller to them for their labor and materials in the construction of the said building as aforesaid, and the remaining twelve promissory notes, aggregating $10,350, as aforesaid, all payable to
8 the order of the defendant Charles L. Frailey, representing the said second encumbrance, which was admitted upon an equal footing with these complainants by their consent, from the considerations above mentioned.

6. By the said deed of trust to the complainant Grayson and the defendant Heald, and for the better security of the beneficiaries thereunder, it was further provided that the said trustees under the said deed to Grayson and Heald, should collect the rents and profits of the said Victoria Flats building, over and above the amounts necessary to pay the interest on the debt secured by the first trust on the said property, and taxes and insurance, and the repairs and running expenses of the said building so long as any part of the indebtedness secured by the said second trust should remain due and unpaid, and to apply the rents and profits as frequently as practi-

cable on the notes, secured by the said second deed of trust, *pro rata*, until all the indebtedness thereby secured should have been fully paid; and, pursuant to the said provision of the said deed of trust, the said property was placed in the hands of the firm of B. H. Warner & Co. to collect the said rents, issues and profits, and pay the interest on the said first trust, together with the taxes, insurance, repairs etc., and to account to the said trustees Grayson and Heald for the surplus rents, under which arrangement the surplus rents and profits of the said building were paid over to the said Grayson and Heald and applied toward payment of the interest on the promissory notes secured
9 by the second deed of trust until about the month of May, 1899, when, upon the representation that the expense of real estate agents' commissions would thereby be saved, and that the income of the said premises would otherwise be increased, the said trustees Grayson and Heald acquiesced in permitting the defendant Frank I. Wood, who had become interested in the property as hereinafter shown, to collect the said rents and profits, it being understood that they would be applied as theretofore, to protecting the property against sale under the first trust by payment of the interest, taxes, insurance and other necessary charges, and that any and all surplus of said rents above the said charges would be applied to the promissory note secured by the second trust.

7. The complainants further show to the court that, the defendant Haller becoming otherwise embarrassed, and being threatened with judgments then about to be recovered against him on account of other transactions, the said defendant, at the instance of the said Frank I. Wood, executed to Alexander H. Holt and Frank A. Sebring, as trustees a third trust upon the Victoria Flats property, recorded in Liber 2265, at folio 254, and, at the instance and by direction of the said Frank I. Wood, on or about the 31st day of March, 1898, upon an alleged nominal consideration of ten dollars, said Haller further conveyed to the defendant Bernard A. Duke, by deed recorded in Liber 2304, at folio 370, the east one hundred and thirty-four (134) feet, by the width thereof, of lot one (1), and the north fifty-five (55) feet by a depth of one hundred and thirty-four (134) feet of lot two (2), thus, it will be seen, including with the Vic-
10 toria Flats property the ten foot strip on the western and southern boundaries of the said property, rendered necessary thereto in the manner and for the purposes above shown. The said Duke, as these complainants are advised and believed, and therefore aver, was a man without financial responsibility, who paid nothing to the said Haller for the said conveyance, and who in fact was a mere nominal grantee, to hold the property for the benefit of the defendant Haller and for that of the defendants Wood and Talbott, who had in some manner and to some extent, to the complainants unknown, become interested in the said property. Even if, however, the said Duke had been an actual *bona fide* purchaser for value, and a stranger in interest to the other parties concerned, the complainants are advised and believe, and therefore aver, that, in

and by these several transactions, namely, the construction of the said building in such manner that light and air from the west and south were indispensable to said building, the said building and said adjacent ground being the property of the same owner, and by the said transaction between the said Haller and the holders of the deed of trust upon the adjacent property providing for a ten foot accretion to the Victoria Flats property to the west and south, as above set forth, by the deed of trust from the said Haller upon the Victoria flats, then actually constructed in part upon the said ten foot strip as hereinafter shown, to the said Grayson and Heald, for the benefit of the complainants, without disclosing to them, and
11 without their knowledge, that the said deed of trust did not include all the ground upon which the said building stood, and by this conveyance by the said Haller to the said Duke of the said Victoria Flats property, with the said ten foot addition thereto, as a single property, all persons were put upon notice of the equities of the beneficiaries under both the first and second trusts, being persons who had advanced the money and materials and had performed the labor in the construction of the said building, in ignorance of the fact that said building was, or would be, constructed in part upon ground not included in the said deeds of trust, to have the said adjacent strip annexed to the building, or to have the said building declared entitled to an easement over the same, for their necessary protection. In addition, and in pursuance of the said known plan to add the said ten foot strip to the said building, the defendant Haller constructed porches to its south and west sides extending six feet over upon the said ten foot strip, and, also, a cement walk, about five feet in width, over the said strip, and, also, constructed areaways for light and ventilation to the basement floor or story of the said building, the said areaways being, also, upon the said adjacent strip, all of which was done in the original construction of the said building, and before the trust to the said Grayson and Heald was executed, as aforesaid.

8. As the complainants are further informed and believe, and therefore aver, the defendant Haller, because of his said embarrassments growing out of other transactions, and upon the advice
12 and by direction of the said defendant Wood, on the 20th day of December 1897, executed a deed of trust to Alexander H. Holt and Frank A. Sebring, as trustees, the same being recorded in Liber No. 2265, at folio 254, of the said land records, purporting to convey the west sixty-six feet (66) by the width thereof of lot one (1), and all of lot two (2) except the north forty-five (45) feet by a width of one hundred and twenty-four (124) feet, to secure thirty-four (34) promissory notes of the said defendant Haller, of one thousand dollars ($1,000.00) each, aggregating thirty-four thousand dollars ($34,000.00), bearing interest at the rate of six per centum per annum, and payable five years after their date, to the order of one William Oscar Roome, and the defendant William J. McClure, no such notes, however, in fact ever having been delivered to the said Roome and McClure, and the said defendant Haller not being

in fact indebted to them in any such sum, or in any sum represented by the said notes; nor are the said promissory notes now held by the said Roome and McClure, nor were they ever so held, nor have they ever been endorsed by them to any other person or persons whomsoever, the said transaction being, as the complainants are advised and believe, wholly fictitious.

9. Sometime after the execution of the trust to the said Grayson and Heald, the defendants Wood and Talbott, having become, or having claimed to have become, in some manner to the complainant unknown, interested in the said property endeavored to purchase the promissory notes secured by the said
13 second deed of trust at a heavy discount, the said Wood making threats that those who refused to accept such discount or reduction would get nothing, and, in one or more instances declaring that he would see that they got nothing. Failing in their attempt to purchase the said notes at the price they were willing to pay for them, and the defendant Wood having, on or about the 31st day of July, 1898, procured a conveyance in fee simple from the defendant Haller to himself, without considerations as the complainants are informed, believe and aver, duly recorded in Liber 2322, at folio 429, of the said land records, of the said west fifty-six (56) feet by the width of lot one (1) and the part of lot two (2) not embraced in his said deed to Duke, and thereafter, to wit, on the 13th day of March, 1899, upon an alleged nominal consideration of ten dollars, but also without any real consideration, as they are informed, believe and aver, procured from the defendant Duke a deed to himself, recorded in Liber 2377, at folio 373, of the ten foot strip on the west and south sides of the Victoria Flats property, included in the deed from the defendant Haller to the defendant Duke as above set forth, thus attempting to separate this necessary part of the said property from the main property itself, and to prevent any such sale of the said flats property as would realize a fund sufficient for the second trust creditors; and he thereupon, on or about the same date, secured a release from the said trustees Holt and Sebring to himself of the said property so as aforesaid conveyed to them by Haller to secure the said fictitious
14 indebtedness of thirty-four thousand dollars ($34,000.00) which said release is signed by the said Duke representing himself to be the holder of the said thirty-four thousand dollar notes secured by the trust in question, and purporting to have been made to the order of the said Roome and McClure, to whom the said trust represented the said Haller to have been indebted in the said sum.

10. The said ten foot strip upon the west and south of the said building was never in fact released from the first trust to defendants McReynolds and Meriwether, as agreed, for the reason, as the complainants are informed and believe, and therefore aver, that the four thousand dollars which was to be paid on account of the said trust, as the condition of the said release, has not yet been paid absolutely, and in such manner as to extinguish the said four thousand dollars

of the said first trust indebtedness; but, in lieu thereof, the defendants Haller and Wood executed their promissory note to the order of the defendant The First National Bank of Gaithersburg, which discounted the said note, in the said sum of four thousand dollars, which money was paid to the defendant Alice S. Hill, the holder of the four thousand dollars of the said trust indebtedness which it was proposed to extinguish, and, for the time being, and as security for the said note of the said Haller and Wood, the said First National Bank of Gaithersburg was permitted to hold two notes of two thousand dollars each, being two of the six notes secured by the trust to McReynolds and Meriwether as aforesaid. The defendant H. Maurice Talbott, as these complainants are advised and believe, and therefore aver, represents himself to be the holder of these two promissory notes, secured by the said trust to McReynolds and Meriwether, and claims to be otherwise interested in the Victoria
15 flats and adjacent property, but in what manner he is so interested complainants are unable to set forth. According to their information and belief, he is not the holder of the said two notes, but the same are deposited as collateral security with the First National Bank of Gaithersburg to secure the money paid to the defendant Hill for the said notes as aforesaid.

11. In further prosecution of their design to prevent sale of the Victoria Flats property for more than enough to satisfy the first trust, and, by so preventing an advantageous sale thereof, to cut off these complainants and others, the holders of the notes secured by the deed of trust to the trustees Grayson and Heald, the defendants Wood and Talbott now claim, not only that the said Victoria Flats property is without any right to light and air over the ten foot strip above referred to, but that the main building, itself, encroaches for one or more inches over the property covered by the deeds of trust to defendants Warner and Wine and Grayson and Heald, and are giving notice that they propose to deny to the said property the right to use the said ground on which said building rests, and also, to deny to it any light, air, or other easement over the said ten foot strip; and, in further pursuance of their purpose, although they have been in receipt of the rents and profits from the said building, as these complainants are advised, entirely sufficient to pay the interest due on the first trust, they have neglected and refused to pay the said interest, and have thereby caused the said premises to be advertised for sale by the defendants Warner and Wine under the first trust, for default in the
16 payment of one instalment of interest, now overdue, a copy of which said advertisement is hereto annexed, marked Complainants' Exhibit A, and prayed to be read as part hereof, the said sale being set for Thursday, the seventh day of September, 1899. Upon learning of this state of affairs, the complainant Grayson as trustee, and on behalf of himself and other beneficiaries under the deed of trust to himself and the defendant Heald, personally requested the defendant Wood to apply the rents in their hands to the payment of the said interest, and thus prevent the said sale, offering, if the said rents were not sufficient to fully pay the

same, that he, the said Grayson, and the parties he represented would advance enough money to make up the deficiency and to provide for the payment of the said overdue interest and thus prevent the said sale; with which request the said defendant declined to comply, and then and there declared to the said Grayson that he and Talbott, by reason of their ownership of the said ten foot strip, held the key to the situation, that they were willing that the Victoria flats should be sold, that the complainants could buy them in if they saw fit, and that he and the defendant Talbott could realize their claims out of the adjoining strip of ground. Thereupon the said Grayson inquired of the defendants Wood and Talbott at what price they would be willing to sell the said ten foot strip of ground, to which the defendant Talbott answered they "did not know, but it would be high enough."

12. In further prosecution of their attempt and purpose to have the said Victoria Flats property sold under conditions which would prevent its bringing more than the first trust, and thus
17 deprive the beneficiaries under the second trust from all benefit of their security, and of enabling the same to be bought in by or on behalf of themselves, discharged of the complainants' said lien, the said Wood on Saturday, the second day of September, 1899, and just four secular days before the date set for sale of the said property, instituted suit in this honorable court, in equity cause No. 20,759 (a copy of which bill is herewith filed, marked Complainants' Exhibit C.) and prayed to be read as part hereof, against the defendant Bernard A. Duke who, as above stated, has never been anything more than a nominal party in any of the transactions affecting the said property, and, as the complainants are informed and believe, and therefore aver, is really merely a representative of the defendants Wood and Talbott, alleging that the walls of the said Victoria flats are pierced with a large number of windows, have large porches extending six feet from the walls, and that the eaves of the roof project beyond the walls and cause rain water and melted snow to fall upon the premises of the said Wood, meaning the ten foot strip above referred to, and that these constructions were made without his consent or permission, and that it seriously injures his land and diminishes its value, thereupon praying the court to declare the same nuisances, and to order their abatement. As above stated, the constructions complained of were made by the defendant Haller, as a part of the Victoria flats as originally built, when the said Haller was the owner of all the ground in question, and the said Haller subsequently conveyed the said ten foot strip in controversy together
18 with the Victoria Flats property as a whole, to the defendant Duke, thereupon conveying to the defendant Wood only what was left of the adjacent property, exclusive of the said ten foot strip; and it was only through the subsequent transactions between the said Duke and the said Wood, beginning in March of the present year, without consideration, and in bad faith to the said Haller as well as to themselves, as they are informed, believe and aver, that the said Wood acquired any interest in the said ten foot

strip, the said transaction between the said Wood and Duke being contrived and intended, as these complainants believe and aver, for no other purpose than the accomplishment of their inequitable design to cause a sacrifice of the Victoria Flats property, and to prevent the complainants and others in like situation from realizing their just claims out of the same.

13. The complainants are advised and believe, and therefore aver, that, under the terms of the deed of trust to defendants Grayson and Heald, it is inequitable and unconscionable on the part of the said Wood, or the said Wood and Talbott, to permit the Victoria flats to be sold for default in the payment of interest under the first trust when they are in possession of rents and profits applicable to the payment of the said interest, notwithstanding the offer by and on behalf of these complainants to supplement the funds in hand, if necessary, fully to meet the said interest in arrears. They are further advised and believe, and therefore aver, that no sale of the said Victoria Flats property can be made to advantage, or without great and inequitable sacrifice, while the defendants Talbott and
19 Wood are claiming to control the said ten foot strip, and are both by the said court proceeding and otherwise giving notice to the world that no purchaser at any sale of the said first trust will be permitted to use the windows, porches, areas and other necessary parts of the said building, and that the said building itself is in part upon land not covered by the said trust, but belonging to or controlled by them; and that no sale of the said premises should be made or permitted until the property can be freed from the cloud and embarrassment produced by the said claims and the said suit of the said defendants, nor until the rights of the parties can be ascertained. They are advised and believe that, upon equitable terms with regard to the holders of the promissory notes secured by the deed of trust to McReynolds and Meriwether, such as payment of any balance which may remain unpaid of the said encumbrance after sale of the property covered thereby, exclusive of the said strip, they are entitled to have said strip re-united to the said flats property; and they here tender themselves ready and willing to submit to any terms of relief in that regard which the court may prescribe.

14. The defendant John C. Heald, co-trustee with the complainant David C. Grayson under the deed of trust hereinbefore referred to, has informed these complainants that he is now the representative of interests in some respects inimical to those of the parties represented by the said deed of trust, that he is desirous of resigning his said trust, and that, for these reasons he is unwilling to be a party complainant with them in this proceeding.

20 Wherefore, and because they are without adequate remedy at law, the complainants pray as follows:

1. That Frank I. Wood, H. Maurice Talbott, Bernard A. Duke, Nicholas T. Haller, Brainard H. Warner, Louis D. Wine, Frank L. Freeman, Laura R. Gray, James P. Lowe, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, John C. Heald, and The First National Bank of Gaithers-

burg may be made parties defendant hereto, served with process, and required to answer the exigency of this bill. Answer under oath by the defendants Frank I. Wood, H. Maurice Talbott and Bernard A. Duke, being hereby expressly waived.

2. That a receiver may be appointed by this honorable court, pending the suit, to take possession of the Victoria Flats property, to collect the rents, issues and profits thereof, including the rents, issues and profits in the hands of the defendants Frank I. Wood and H. Maurice Talbott, or either of them, and to apply the same, so far as may be necessary, to the satisfaction of the interest due under the first trust and other necessary and proper charges.

3. That the defendants Brainard H. Warner and Louis D. Wine may be enjoined, pending this suit, or until further order of the court, from making sale of the said Victoria Flats property, under the deed of trust to them described in the bill.

4. That the property actually covered by the Victoria Flats property, including its porches, eaves, and other necessary parts,
21–24 may, by decree of this court, be decreed to be subject to the deed of trust to the defendants Warner and Wine, and to the deed of trust to the complainant Grayson and the defendant Heald, whether or not the said parts of said building *is* actually constructed, or covered by the metes and bounds described in the said bill.

5. That the said Victoria Flats property may, by decree of this honorable court, be decreed to be entitled to the easements of light and air over the ten foot strip of ground adjoining the same on the west and south, or that the said ten foot strip of ground may be decreed to be a part of the said Victoria Flats property upon such terms as the court may fix.

6. That the complainants may have such other and further relief as the nature of the case may require.

DAVID C. GRAYSON, *Trustee.*
CHAS. W. MUDDIMAN.
A. S. REAVES.
CHAS. ERNST.
JOHN E. SHECKELLS.
D. A. DONNELLY.
J. M. PRUETT.
THOS. R. RILEY.
G. C. ESHER.
GEORGE H. ZELLERS.
MICHAEL SHEA.
WILLIAM J. McCLURE.
DAVID C. GRAYSON.
EDWARD J. HANNAN.
JOHN R. GALLOWAY.
CALVIN CAIN.
FREDERICK W. BUDDECKE.

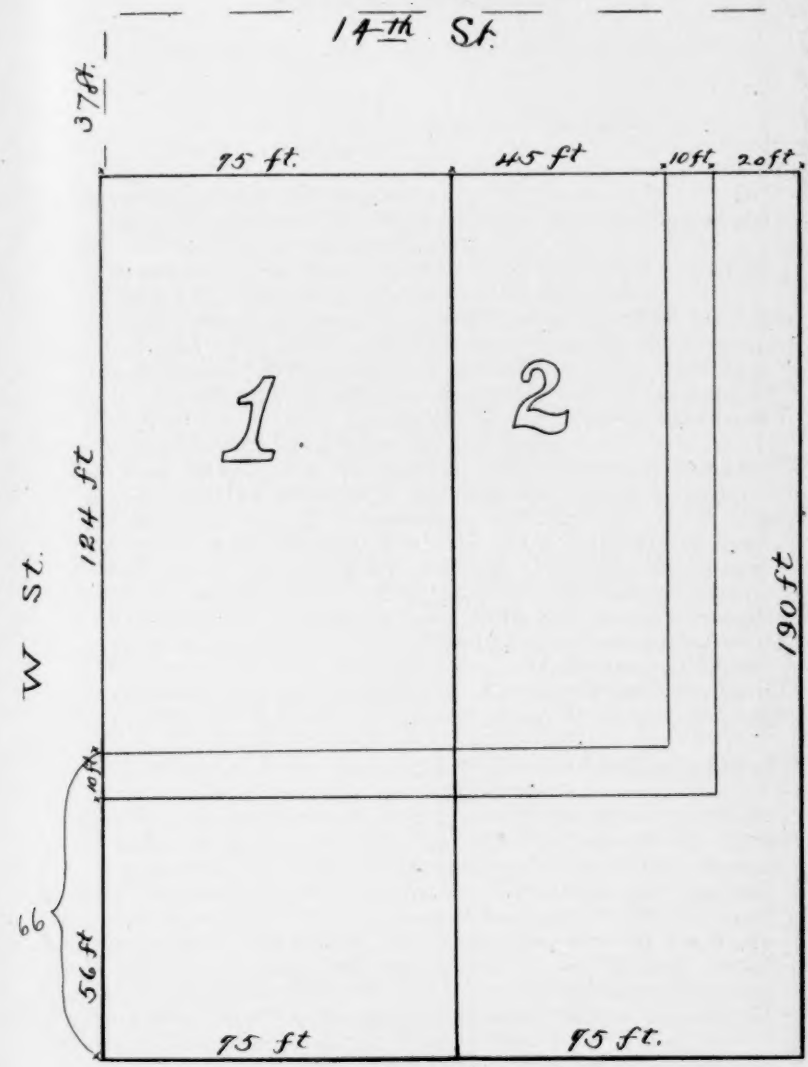
J. J. DARLINGTON,
Solicitors for Complainants.

* * * * * * *

(Here follows diagram marked p. 25.)

EXHIBIT B.

Filed, SEPTEMBER 6, 1899.



No. 1804.
F. I. Wood et al
vs.
D. S. Grayson, trustee, et al
} p. 25.

26 EXHIBIT "C."

Filed September 6, 1899.

In the Supreme Court of the District of Columbia.

FRANK I. WOOD
vs.
BERNARD A. DUKE. } In Equity. No. 20759.

The complainant states as follows:

1. That he is a citizen of the United States, and a resident of the District of Columbia, and sues in his own right.

2. The defendant is a citizen of the United States, and a resident of the District of Columbia, and is sued in his own right.

3. Complainant is the owner of the following described parts of lots one (1) and two (2) in block forty-five (45) in the sub-division made by William C. Hill of certain land now known as "University Park," in the county of Washington, in the District of Columbia, as per plat recorded in Book County No. 6, page 5, in the surveyor's office of said District, being described as follows:

Beginning for the same, at a point in Welling place one hundred and twenty-four (124) feet west of the northeast corner of said lot one (1) which is also the intersection of Fourteenth street and Welling place, and running southerly on a line parallel with Fourteenth street, one hundred and twenty (120) feet; thence easterly on a line parallel with Welling place one hundred and twenty-four (124) feet; thence southerly along the line of Fourteenth
27 street thirty (30) feet; thence westerly on a line parallel with the line of Welling place, one hundred and ninety (190) feet; thence northerly on a line parallel with Fourteenth street one hundred and fifty (150) feet; thence easterly along the line of Welling place sixty-six (66) feet to the place of beginning.

4. The defendant is the owner of the following described parts of said lots one (1) and two (2) in said sub-division:

Beginning on Fourteenth street at the north-east corner of said lot one (1) and running thence south one hundred and twenty (120) feet; thence west one hundred and twenty-four (124) feet; thence north one hundred and twenty (120) feet thence east one hundred and twenty-four (124) — to the place of beginning. Which parcel of land is improved by a large apartment house covering the whole of said parcel; and which building encroaches on the land owned by complainant to the extent of one (1) inch along the southern line and five one-hundredths of a foot along the western line of said building which is known as the Victoria flats.

5. The walls of said building which is surrounded on its southern and western side by complainant's land, are all pierced with a large number of windows; and on each of its said western and southern walls, are a large number of porches which extend the whole depth

and width of said building and project from the walls about six feet (6). The eaves of the roof of said building project beyond the face of the southern and western walls, and as a result of said
28 projection, rainwater and melted snow fell from said eaves upon the land of the complainant. Around the base of said walls, areaways have been excavated opposite each window of the basement floor. Such excavations extending on an average about two (2) feet into the land of complainant.

6. None of these constructions were made with the consent or permission of complainant. They all seriously injure his land and greatly diminish its value.

7. Complainant is advised and so charges, that the said windows porches, projecting eaves and areaways are each and all nuisances, and injurious to his property, the continuance of which, he is entitled to prevent by obtaining an appropriate decree in this cause.

Complainant therefore prays:

1. That the defendant may be enjoined and prohibited from continuing to maintain the said windows, porches, projecting eaves and areaways.

2. That a mandatory injunction of this court may be granted requiring the defendant forthwith to close the said windows, and to remove the said porches, projecting eaves and areaways.

3. That complainant may have such further and other relief as the nature of his case may require.

To which end, complainant prays for process of subpœna against the said defendant, Bernard A. Duke, requiring him to appear and answer the exigency of this bill.

FRANK I. WOOD.

JNO. RIDOUT,
Solicitor for Compl't.

29–32 I do solemnly swear that I have read the foregoing bill, by me subscribed and know the contents thereof; that the facts therein stated, as of my personal knowledge are true, and the facts therein stated, upon information and belief, I believe to be true.

FRANK I. WOOD.

Subscribed and sworn to before me this 29th day of August, 1899.

CHARLES S. BUNDY,
[SEAL.] *Notary Public, D. C.*

* * * * * * *

33 *Order Allowing Drew to Intervene.*

Filed September 8, 1899.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, *et al.*, Complainant-,
vs.
FRANK I. WOOD ET AL., Defendants. } In Equity. No. 20773.

Upon the hearing and consideration of the petition of Fred 34–46 Drew to become a party complainant in the above-entitled cause filed on the sixth day of September, A. D. 1899, it is this 8th day of September, A. D. 1899, ordered that the petition be, and the same hereby is, granted, and the said Fred Drew be, and he hereby is, made a party complainant in said cause.

CHAS. C. COLE,
Asso. Justice.

Assented to:
J. J. DARLINGTON,
Sol'r for Compl't.

Sept. 8, '99.

* * * * * * *

47–56 *Answer of Bernard A. Duke.*

Filed Nov. 7, 1899.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, *et al.*
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

The defendant, Bernard A. Duke, for answer to the bill in this cause and the petition of Fred Drew says:

He has no beneficial interest in any of the property described in the bill, his only connection with any part of said property, being that he holds title to the part of said real estate described in said first and second trusts, in trust for the defendants Wood and Talbott, as tenants in common in fee.

He is advised that he is not required to answer the other allegations of said bill.

And having fully answered, he prays to be hence dismissed, with his costs.

BERNARD A. DUKE.

* * * * * * *

57 *Order Making Morse, Williams & Co. Party Complainant, &c.*

Filed June 16, 1900.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL. } Equity. No. 20773.

Upon consideration of the petition of Morse, Williams & Company, it is this 16th day of June, A. D. 1900, ordered, that said Morse, Williams & Company be, and they are hereby made party complainant in this cause as in and by said petition prayed for.

A. B. HAGNER,
Asso. Justice.

No opposition:
J. J. DARLINGTON,
Sol'r for Compl'ts.

58 *Amended Answer of Frank I. Wood.*

Filed Sep. 21, 1901.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, *et al.*
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

The amended answer filed by leave of court of the defendant Frank I. Wood, for answer to the bill and the petition of Fred. Drew in this cause, says:

1. He admits the allegations of paragraph 1 of said bill.

2. He believes the allegations of paragraph 2 of the bill to be true, except the allegation that the defendant Talbott claims to hold 2 of the promissory notes secured by the deed of trust last mentioned in said paragraph, which allegation he denies.

3. He admits the conveyance of lots one and two in block forty-five of W. C. Hill's sub-division of University Park, by Alice S. Hill to defendant Haller, as set forth in paragraph three of the bill. He admits the execution by said Haller of the deed of trust to defendants Warner and Wine, set forth in said paragraph; and says that the parcel of land conveyed by said deed of trust has a frontage on Fourteenth street of one hundred and twenty (120) feet extending back to a depth of one hundred and twenty-four (124) feet. Said deed of trust was executed and recorded before the erection of any buildings on the land therein described and when said land

was vacant and unimproved. He admits the execution of the deed of trust by the defendant Haller to the defendants, McRey-
59 nolds and Meriwether to secure six (6) promissory notes, as set forth in said paragraph.

He has no personal knowledge concerning the holders of the promissory notes secured by the first mentioned deed of trust, nor whether they are numerous; and so far as these allegations are material, requires strict proof thereof.

4. He admits the erection by said Haller of an apartment house known as the "Victoria flats" on the parcel of land conveyed to the said Warner and Wine. He does not know the exact size of the said building and so far as the allegation on that subject in the said paragraph four (4) is material, requires strict proof thereof. He denies on information and belief, that it was the intention of said Haller to erect said building on the rear and south lines of the parcel of land described in the said deed of trust; and while he has recently been informed that the said building encroaches five one-hundredths of a foot on the west, and one inch on the south over the adjacent land, he believes that the said location was unintentional, and that said Haller intended to erect the said building well within the lines of the conveyance to Warner and Wine. He admits that the said Haller inserted a large number of windows in the western and southern exposures of said building, but is advised and believes and therefore avers, that in the erection of a building of this character due allowance generally is, and should always be made for the maintenance of said windows, irrespective of the bare contingency of the continued vacancy of the adjoining ground owned by other parties, and further says that while said windows may be necessary for the most convenient use of the building, as
60 said building is now constructed, yet nevertheless he is advised and therefore avers, that if said building were remodeled to conform with a proper plan such as should have originally been adopted, that then and in that case said windows would no longer be such a necessity to the proper and successful use of the said building as is averred in the bill. He denies that the location of said building was due to the existence of any valid building regulations which prevented said Haller from erecting said building as he had originally intended to build the said flats with regard to the probability of the adjoining property, already heavily encumbered, passing into the hands of other parties, but that the said Haller being told that there was some building restriction which prevented his building as he had originally intended, without investigating the said fact as to whether or not there did exist any such restriction, built said flats in the manner in which they now remain. And the respondent further avers that it could not have been the intention of the said Haller as alleged in said bill, to have erected the said building in the center of lots one and two, for the reason that the deed of trust securing to Warner and Wine the building loan by means of which said flats property was to be erected, expressly included in metes and bounds only that portion

of the said lots one and two upon which the flats property was subsequently erected and upon which they now remain. He denies that any agreement was ever entered into between the defendant Haller and the holders of the promissory notes secured by the deed of trust to McReynolds and Meriwether that, upon payment of four thousand ($4,000) dollars, the ten foot strip adjoining the building on the south and west should be released and become part of the Victoria Flats property; and
61 he avers that on the fourteenth day of February, 1898, shortly after the maturity of two of the notes mentioned in said deed of trust, the defendant McReynolds for the purpose of procuring the payment of said notes, wrote the said Haller that, if the notes then due were paid prior to March 10th, 1898, the ten foot strip adjoining the Victoria Flats property on the south and west, would be released; but no part of the said sum of four thousand ($4,000) dollars was paid, or has been since that time paid by the said defendant Haller; and the trust upon said land surrounding the Victoria flats remains the same as originally created by said deed of trust. Subsequently, and after the time limit contained in the letter of Mr. McReynolds had expired, this respondent and said Talbott arranged to obtain on the collateral security of two (2) two thousand dollar ($2,000) notes secured by the said deed of trust to McReynolds and Meriwether, pledged with the First National Bank of Gaithersburg, a sum sufficient to pay to said Alice S. Hill, the sum of four thousand ($4,000) dollars; but the said notes have not been paid, and the said trustees are not bound to make any partial release of the trust to them.

This respondent denies that the motive of the transactions between said Haller and said McReynolds was to add the said ten foot strip to the said flat property, or to impose any easement upon said strip in favor of said flats property.

But avers that this respondent as one of the equitable owners of the flats property, realizing the danger to said property due to the improper construction of the said building as before alleged,
62 did consult one of the trustees holding legal title to the adjoining property for the purpose of obtaining from the trustees a release of so much of said adjoining property as would in the opinion of the said respondent be necessary to remedy the said defect in the construction of the flats property, but said trustees would not release so much of the land as this respondent desired, but made a counter proposition to release ten feet, which was never accepted nor acted upon by this respondent or by the said Haller.

This respondent denies that the plat referred to in this paragraph of the bill, correctly or intelligibly exhibits the location of the properties therein referred to.

5. This defendant has no personal knowledge of any of the allegations of this paragraph, except those relating to the execution of the deed of trust of the defendant Haller to the defendants Grayson and Heald, which he admits; and he requires strict proof of such further allegations of said paragraph, so far as they may be material.

This defendant avers however that at the time the said deed of trust to Grayson and Heald was executed the said flats property was already completed and occupied its present position, and that upon due inquiry and inspection it would have appeared to the complainants that the said property, owing to its improvident plan of construction was dependent for certain of its light and air upon adjoining property, the legal title to which was not in the said Haller who had executed the deed of trust to them but was in McReynolds and Meriwether as trustees to secure a heavy loan on said adjoining property, and that at the time complainants accepted the said deed of trust to Grayson and Heald, this defendant was not acquainted with
63 said Haller, had had no business dealings with him of any nature, and had no interest in the equity of the said flats property or in the adjoining property, and is informed and believes, and therefore avers, that at the time the said complainants accepted the said trust to Grayson and Heald, they did so because they had no other choice, that the said Haller was practically insolvent, that there were two deeds of trust already upon the said flats property, one of them being the trust for $10,000 executed to the defendants Heald and Rheem, and that the complainants had their choice of filing mechanic's liens against the said flats property or to accept the said deed of trust to Grayson and Heald, and it is believed that the reason of their choice was based upon the knowledge that owing to the improper construction of the flats property as aforesaid, the probabilities were against it bringing a price sufficient to cover their claims, if sold under proceedings to enforce their mechanic's liens, and that they permitted the said Rheem and Heald to participate with them under the said trust to Grayson and Heald in order to retain the said $10,000 for the fuller completion of the said building and the betterment of their security, and not for the alleged benevolent reasons set forth in the bill.

6. He admits that the said deed of trust to Grayson and Heald contains a provision substantially like that set forth in the bill; but this defendant is advised and so avers, that by said provision, said trustees were entitled only to receive the surplus rents and profits derived from said Victoria flats over and above the amount equivalent to the interest on the debt secured by the said deed of trust on said property, taxes, insurance, repairs and running expenses
64 of said building; and that said trustees had no right to receive or in anywise control the expenditure of such sum which was, and is, the property of the owners of said real estate, to wit, this defendant and the defendant H. Maurice Talbott. He denies that pursuant to said provision, the firm of B. H. Warner and Company were authorized to collect said rents, and says that such authority was given them before the execution of the deed of trust to Grayson and Heald. He denies that the agency of Warner and Company was terminated in compliance with any request of this respondent, and says that the fact is, that this defendant and said Talbott, being the owners of said real estate, in the exercise of their authority as such, terminated said agency, and the collection

of said rents was assumed by this respondent with the concurrence of said Talbott, solely by virtue of their ownership as aforesaid.

7. This respondent denies the allegations contained in this paragraph of the bill that the deed of trust from said Haller to Holt and Seebring was executed at this defendant's instance and direction, but on the contrary avers upon information and belief that at the date when the said Haller executed the said trust to Holt and Seebring he was, and for some time had been, absolutely insolvent, that there were against him a large number of judgments, and that so far from the said deed of trust to Holt and Sebring having been made upon the advice or by the direction of the said defendant, Wood, on the contrary at the date of the execution of said trust the defendant Wood was not acquainted with the said Haller, or at least had had no business transactions with him, but that said defendant has been since informed and therefore avers that the purpose of the said trust to Holt and Sebring was to "blanket the thing up" so as to secure to the said Haller some supposed benefits "in case
65 the building was sold and brought more than the first and second trusts," which result could never have been obtained because the Holt and Sebring trust does not include the flats property and its execution was therefore entirely a foolish and unnecessary action on the part of the said Haller, thus indicating clearly that he could not have had the benefit of this defendant's advice upon the matter. The defendant further avers that for the reason above indicated viz, that the said deed of trust did not include any part of the land described in the deed of trust to Grayson and Heald, the execution thereof in no wise affects any rights of the complainants and is wholly immaterial in this cause.

This defendant admits the execution by said Haller to the defendant Duke of the deed of March 31st, 1898, conveyed the east one hundred and thirty-four (134) feet, by the width thereof, of lot one (1) and the north fifty-five (55) feet by a depth of one hundred and thirty-four (134) feet of lot two (2); and says that this defendant purchased an undivided one-half interest in the property described in the said conveyance from the said Haller; and that he paid him full value for the conveyance of said interest by conveying to Joseph S. Haller, at the request of said Nicholas T. Haller, the equitable interest of this defendant in certain real estate being all of lot G, and part of lot F, of square 226, in the city of Washington, District of Columbia; and this defendant avers that he was an actual *bona fide* purchaser from said Haller, and he denies that he had any notice, either actual or constructive of any right of the Victoria Flats property to an easement over the said ten foot strip; on the contrary, he distinctly understood that no such right existed, and for that reason insisted upon the inclusion of the ten foot
66 strip in the deed to said Duke; that the said Duke at first held title to said real estate as trustee for said Haller and this defendant, as tenants-in-common in equal shares, and after the purchase of the one-half interest of said Haller by said Talbott, the said Duke held said title in trust for this defendant and said Talbott in common in equal shares.

The defendant further avers that it has never been asserted by him or by the defendant, Talbott, that the said Duke was himself a *bona fide* purchaser for value of either the flats property or the so called ten foot strip. And this defendant says that said Duke was merely the trustee as above set forth. The defendant has previously denied that the property adjacent to the flats property was owned by the said Haller as alleged in this paragraph of the bill and has explained that it was heavily encumbered, and has heretofore in this answer shown the circumstances under which one of the said trustees holding the said adjacent property had agreed to release some portion of the same, and, as heretofore alleged, that said offer was never accepted or any agreement consummated in regard thereto. And the defendant here avers that if the said flats property as is alleged in the bill was constructed in part upon the so-called ten foot strip, that this was wholly unknown to this defendant until a long time after the said deed of trust to said Grayson and Heald had been executed and their rights had become fixed and determined by said deed of trust and by other instruments relating to said property previously recorded. The defendant further says that if said encroachment was unknown to the complainants at the time they chose the alternative of accepting as security for their debt a trust upon the said flats property, such ignorance on their part was due to their failure to take reasonable business
67 precautions in the premises by causing the land records to be examined and by inquiry at the surveyor's office, and the defendant further avers that the conveyance by the said Haller to the said Duke of the said Victoria Flats property with the said ten foot addition thereto, as a single property could not have affected the plaintiffs in this cause since the said conveyance to the said Duke was made after their trust had been executed and recorded, and not in pursuance of any agreement with them nor in recognition of any right to which they were entitled.

In answer to the further allegation of this paragraph in the bill contained, referring to "the said known plan to add the said ten foot strip to the said building," the defendant avers that at the time of said trust there could have been no plan to add the said ten foot strip to the said building because at the time of the execution of the said Grayson and Heald trust no word had been spoken to either of the trustees of the adjoining property by this defendant nor as he believes and therefore alleges by the said Haller. The said trust to Grayson and Heald was recorded December 28th, 1897, while the offer first made to Haller by one of the said trustees of the adjoining property was made in February of the following year, and the conversation between this defendant and one of the trustees as aforesaid, was subsequent to the date last mentioned. Said circumstances could therefore have had no influence in determining these complainants to accept the security given them upon the previous date. Defendant further says that he is advised and believes that the porches to the south and west of said building did not extend for a distance of six feet into the so-called ten foot strip, but are on the

contrary but four feet and a fraction. The defendant admits
68 that said windows were opened and said porches constructed prior to the trust to the said Grayson and Heald, and therefore alleges that the said Grayson and Heald took said trust with full knowledge that the said windows overlooked and the said porches extended over property not included in said property, described by exact metes and bounds, upon which these defendants were secured.

This defendant is advised and so avers, that none of the matters and things set forth in this paragraph of the bill, created an equity in favor of the beneficiaries under either the first or second trust to any easement over the said adjacent strip of ten feet; or created any right to have said strip annexed to the building. This respondent says that no claim was ever made by any one to any such rights in respect to the said ten foot strip, until the filing of the bill in this cause, when it was for the first time set up in order to afford some apparent support for the contentions set forth in said bill.

This defendant denies that the said Haller ever intended to include the said ten foot strip as part of said flats property, and he says that said Haller intended to, and believed he had, so located the said building within the lines of said deeds of trust, as to afford the necessary places for light and ventilation, without including any other land.

8. This defendant has already answered the allegations of the eighth paragraph of the bill, and reiterates his denial that he caused the deed of trust therein set forth to be executed, or that he had any part therein. He believes that the said deeds and notes were executed wholly without consideration for some purpose known only by said Haller; and this respondent's only connection there-
69 with, has been to insist that the said deed of trust should be released. In any event, however, the execution of said deed of trust is immaterial in this controversy.

9. It is true, that after the execution of the trust to Grayson and Heald this defendant and said Talbott became the owners as tenants in common of the real estate therein described. The facts concerning the purchase of the one-half undivided interest by this defendant from said Haller, have hereinbefore been stated. Afterwards the said Talbott became the purchaser of the one-half undivided interest of said Haller in said real estate and in the remaining portions of said lots one (1) and two (2) in said block 45, for which said Talbott paid the sum of thirty-one hundred ($3100) dollars in notes, which he has since paid.

This respondent is familiar with the history of the transactions between said Talbott and said Haller, and knows that it was *bona fide* in every respect; and that the said Talbott took title without any notice, actual or constructive of any such claim to an easement in favor of said flats property over said strip as now claimed by the complainants in this cause.

This defendant denies that he ever attempted to purchase the promissory notes secured by the said second deed of trust, at a heavy

discount, or at any discount whatever or that he ever made any threats that those who refused to accept such discount would get nothing; or that he ever declared that he would see that they got nothing.

The defendant alleges that the only inquiry that could be tortured into an offer to purchase the notes at a discount was an inquiry
70 made by this defendant of the said Grayson and others whether in the event of this defendant's being able to get a loan of $100,000 they would be willing to make a reduction in the amount of their claim in order to bring the total encumbrance upon the flat property within the amount of the proposed new loan.

This defendant denies that the conveyance by said Haller to him of the 13th of July, 1898, was without consideration and says that he purchased a one-half undivided interest therein from said Haller and paid therefore, in cash, the price agreed upon between himself and said Haller which was the full value of the interest purchased; and this defendant says that said purchase was in all respects *bona fide*. He also insists that the questions of the purchase and mode of conveyance of all of said land are immaterial in this case since such purchase was made after the rights of the complainants had been determined and fixed in the instrument previously executed under which they claim. After this defendant's purchase, as aforesaid, the said Talbott as hereinbefore set forth, became the purchaser of all the interest of said Haller in said lots one (1) and two (2) for the consideration of thirty-one hundred dollars ($3,100). The title to the flats property as described in said deeds of trust is now held by the said Duke in trust for this defendant and said Talbott as tenants in common in fee; and the title to the remainder of said lots one (1) and two (2) is held by this defendant in trust for said Talbott and himself as tenants in common in fee.

It is true that on the 13th day of March 1899, the defendant Duke conveyed to this respondent, the ten foot strip on the west and south sides of the Victoria Flats prop-
71 erty. This strip had, as heretofore stated, been included in the deed to Duke at the instance alone of this defendant, and not because of any original intention on the part of said Haller or said incumbrancers, that it should be so included. After the equitable title to said real estate described in the deed to Duke had vested in this defendant and said Talbott they, in the exercise of their right of ownership, directed the conveyance by said Duke to this defendant of March 15th, 1899, in order that the two properties should be restored to their original diminsions; and they are advised and so aver, that they had complete authority to direct this conveyance because the said ten foot strip was in no sense subject to any easement in favor of said flats property and was subjected to the unrestricted disposition of the beneficial owners thereof.

This defendant says that said conveyance was not directed for the purpose of preventing an advantageous sale of the said flats property. He has already stated his only connection with the release from Holt and Sebring was to insist upon its execution.

10. It is true that neither the ten foot strip nor any other part of the land included in the trust to McReynolds and Mereweather has been released therefrom, for the reason that no part of the debt secured by said deed of trust has been paid; but this defendant denies that there ever was any such agreement for the release of the ten foot strip as is set up in the bill. When two of the notes became due and the holder was threatening sale, the same was prevented by this defendant obtaining a loan from the First National Bank of Gaithersburg on his note secured by the pledge of the said
72 two notes with said bank. This arrangement, however, was in no sense a substitute for the alleged agreement to release the ten foot strip. The only motive therefore being to prevent a sale under said trust.

This defendant denies that the said Talbott is, or represents himself to be the holder of the two notes so deposited with the Gaithersburg bank.

The extent of the interest of said Talbott in the Victoria flats and adjacent property, and the manner of his acquisition thereof, have heretofore been stated.

11. This respondent denies that he or said Talbott ever formed any design to prevent the sale of the flats property at a sufficient price to pay the second trust creditors, or that they, or either of them did or sought to do any act for that purpose. The fact is that as hereinbefore stated, this respondent at first and afterwards the said Talbott became interested both in the flats property and that adjoining it, by payment of full value; but that neither of them had any interest in the sacrifice of the said flats property.

They are the owners of the said adjoining property free from any easement whatever in favor of the flats property, and realizing that a sale of that property was highly probably have taken such steps as they were advised were necessary to protect their rights in said adjacent property.

It is true that this defendant and said Talbott do deny that said flats property is entitled to any easement for light and air or any other easement over said strip; and this defendant is advised and avers that no such easement or right in favor of said flats property exists; it is also true that the said building does encroach
73 upon the adjacent property to the extent hereinbefore set forth.

It is true that, by every available means, this defendant and said Talbott *has* given notice that they deny the existence of any easement in favor of said flats property over said strip; but this action on their part has been taken in defence of their property against an unauthorized claim of such easement, and not from any other reason.

He denies that when the advertisement of sale was inserted by Warner and Wine, trustees, he had in his hands sufficient rents to pay the overdue interest; and he denies that any such offer as is set forth in this paragraph was made by said Grayson; and he denies that he and said Talbott made the statements to said Grayson, which are set forth in said paragraph, although it is true that

they insisted in conversation with the said Grayson as they now insist, that no easement exists in favor of said flats property over said strip.

12. This respondent admits the institution of the suit referred to in this paragraph of the bill, and says that in the light of the extraordinary contentions set up in this bill the wisdom of his thus manifesting upon the record, his right and claims in the premises is fully vindicated.

This defendant denies the existence of any bad faith on the part of this defendant or said Talbott; or that the purpose of the institution of said suit was any other than that hereinbefore set forth.

The reason why the said suit was filed against Bernard A. Duke was for the obvious reason that Bernard A. Duke held the legal title and was the only person that could be sued.

74 13. This defendant is advised that most of the allegations of this paragraph are addressed to the defendants representing said trust to Warner and Wine; but he denies that the claims of this defendant and said Talbott are set up for the purpose of depreciating the value of the property described in said trust, and says that such claims are made solely in the assertion of the lawful rights of the owners of said adjacent strip.

This defendant denies that the parties claiming under said first and second trusts have any equitable right to have the said strip decreed to be part of the said property included in said trusts; and he is advised and avers that this court is without authority to take the property of this defendant and said Talbott from them and bestow it upon the beneficiaries under said trusts.

14. This defendant is advised that he is not required to answer this paragraph of the bill.

Further answering, this defendant says that the complainants have not in and by their bill made or stated any such case as entitles them to the relief sought by them in their bill, or to any other relief against this defendant and he claims the same benefit of this objection as if raised by demurrer.

FRANK I. WOOD.

JNO. RIDOUT, *For Def't.*

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the amended answer by me subscribed, and know the contents thereof and that the facts therein stated upon my personal knowledge are true, and those stated

75 upon information and belief I believe to be true.

FRANK I. WOOD.

Subscribed and sworn to before me this 5th day of September, 1900.

[NOTARIAL SEAL.] GEO. E. TERRY,
Notary Public, D. C.

76 *Amended Answer of H. M. Talbott.*

Filed Sep. 21, 1901.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, *et al.*
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

The defendant, H. Maurice Talbott, for amended answer, by leave of court filed to the bill in this cause and the petition of Fred Drew says:

1. He admits the allegations of paragraph 1 of said bill.

2. He admits the allegations of paragraph 2 of said bill, except that in relation to two promissory notes which it is alleged this defendant claims to own, which allegation he denies.

3, 4, 5 and 6. This defendant for answer to these paragraphs of the bill, says he adopts the answer of his codefendants, Frank I. Wood, and makes the answer of said defendant to said paragraphs part of this answer.

7. This respondent has no personal knowledge concerning the allegations of the seventh paragraph of the bill, concerning the deed of trust from Haller to Holt and Sebring; and so far as the same may be material, requires strict proof thereof, although he is advised and avers that said allegations, if true, are immaterial in this cause. For answer to the remainder of said paragraph, this respondent adopts the answer thereof, of said Wood, and makes such answer part hereof.

8. This respondent has already answered the allegations of
77 the eighth paragraph of the bill in answering the seventh paragraph but admits that said transactions made by Haller in giving the trust to Holt and Seabring may have been fictitious and avers that Haller said to him that said trust for $34,000 was merely a blind to enable Haller to throw off his creditors; that it did not mean anything and was merely put on to prevent suits, but respondent avers that before he paid over to Haller the consideration for the remaining one half interest in Haller's equity to the flats property and the adjoining property described in the trust to MacReynolds and Merriweather the respondent was satisfied that the notes secured by the said trust to Holt and Seabring were either destroyed or in Wood's hands in whom this respondent then and now has confidence and said deed of trust was subsequently released.

9. Answering the ninth paragraph of the bill, this defendant says that after the acquisition by said Wood of title to one-half undivided interest in said lots one (1) and two (2) this defendant purchased from said Haller, his undivided one-half interest in said lots, which purchase was made for full value, to wit, the sum of $1000 in cash, and twenty one hundred ($2100) dollars, in promissory notes of

this defendant, given to said Haller all of which except one has since been paid. The said purchase was a *bona fide* one in every respect; and this defendant took title without any notice, actual or constructive, of any such claim to an easement in favor of said flats property over said strip as is now claimed by the complainants in this cause. This defendant denies the allegations of said paragraph concerning the attempted purchase of the notes secured by the second deed of trust, but avers that the circumstances and conversations distorted by the complainants for the purpose of
78 lending equitable color to their bill arose as follows: Wood and this respondent found themselves the owners of two distinct properties, one the flats property consisting of the Victoria Flats building and the ground upon which it stood and the other the remaining parts of lots one and two included in the trust to McReynolds and Meriwether. The first of these two properties and the one always thought by this respondent to be the really valuable one and the chief consideration for his purchase was encumbered by two deeds of trust, one for $75,000 to Warner and Wine bearing six per cent. interest per annum and one for $41,000 to Grayson and Heald bearing six per cent. interest per annum, the entire interest charges upon the flats property amounting therefore to $6,960.00 per annum. The defendant Wood, after running the Victoria flats very successfully for a period, having nearly all the apartments let at the highest rental they could demand, demonstrated fully to the satisfaction of this respondent as well as to his own, that the ruinous interest charges made the further operation of the flats a wholly unprofitable undertaking and that unless some plan of reorganization could be thought out and effected the money invested by Wood and this respondent, amounting to many thousands of dollars in cash, must be regarded at least so far as the flats property was concerned, as hopelessly gone. In this crisis Haller suggested that we could refund the mortgage debt upon the flats property and get our money out by borrowing $100,000 at 4 or 4½ per cent., paying off the notes secured by the Warner and Wine trust and have $23,000 (the $100,000 loan less two per cent. commission, less the amount of the Warner and Wine trust) to apply upon the trust held by the complainants in this cause. Haller further represented that the holders of
79 the second trust notes, the notes secured by the Grayson and Heald trust were feeling shakey as to their security and would he thought accept the $23,000 in full settlement and that many of them would take 50% for their claims. Wood and this respondent, knowing Haller's insolvency and that a deficiency judgment against him obtained on his notes would be worthless were prepared to accept his statement of the complainants' anxiety to make a cash realization upon their claims even at the sacrifice of a material reduction of the amount. This respondent and Wood were agreed however, that if they could obtain the $100,000 loan, if the $75,000 trust could be paid off, they would apply the balance of the loan to a cash payment upon the notes held by the complainants and for the balance or difference between the cash payment and the amount of

their claims would execute a second deed of trust to them upon the security of the flats property, the security before held by them, provided two things: First, that they would give up the exorbitant interest named in this trust and accept a lower rate and second, would reduce their claims ten or fifteen per cent. in order that the difference between the earning capacity of the property and the fixed charges in interest might leave a margin sufficient to pay this respondent and Wood a reasonable return upon their investment. That such was the real purpose of these defendants will appear from the facts hereinbefore set forth and from the perfectly apparent fact that had their purpose in purchasing Haller's equity in the flats property been the nefarious one alleged in the bill, viz., in order to buy up the notes of the complainants for a song under threat of having the flats property sold at a sacrifice (a scheme not altogether clear in results or reflecting credit for much ingenuity on the part of this
80 respondent and Wood) then in that case the alleged ends might have been accomplished far more cheaply and more effectively by the purchase from Haller by these respondents of Haller's equity in the adjoining property. As a matter of fact the amount paid by these respondents to Haller is more than equal to the value not only of Haller's equity in the adjoining property but is equal to the full value of the remaining portions of lots one and two included in the trust to MacReynolds and Merriweather, *i. e.* to the value of the equity plus the amount of the heavy encumbrances upon it. The very fair method of refunding the mortgage debt of the flats property above set forth was, as will be shown by the facts below set forth, blocked entirely by the complainant Grayson whose anxiety to realize immediately a substantial portion of his investment has ended by resulting in great loss to himself and fellow complainants as well as to these respondents. In pursuance of the plan above set forth this respondent immediately called upon Brainard H. Warner one of the trustees under the first deed of trust. Mr. Warner was out but this respondent saw Mr. Wine, Mr. Warner's partner in business, and co-trustee, who assured him that in his opinion, there would be no difficulty in having the Warner and Wine loan taken up since they controlled a great many of the notes secured by that trust and those that they could control they would allow to be paid, but that Mr. Willard held one or two of those notes and that he, Wine, was afraid he might have some difficulty with him and that he might have to be given a commission. At all events he told this respondent to go ahead and that his best efforts would be used and he had no doubt with success, to enable these respondents to take this loan
81 up. We had previously applied to Mr. Lampton of Early & Lampton for a loan of $100,000, all that the property would stand, and he assured this respondent that he represented a large financial institution in Baltimore and that there would be no difficulty in making the loan at 4 or 4½ per cent. so that the saving of interest on the larger sum would then have enabled us to carry the loans easily and greatly diminish the drain out of the earnings of

the flats. It then became necessary to see the holder of the notes secured by the second deed of trust who, we had been repeatedly assured by Mr. Haller, would scale their claims so as to enable us to pay and discharge all of their claims in the manner agreed upon by Wood and these respondents. Mr. Wood and this respondent met at Mr. Haller's by agreement to confer with him and then to see as many of the creditors who lived in Washington as we could see that day and ascertain whether arrangements could not be made looking to the scale of their claims, the payment of the cash difference between the amount of the first mortgage and the $100,000, and to secure them for the difference by a second mortgage on the property at a lower rate of interest. While we were talking with Mr. Haller, Mr. Grayson came in and Mr. Haller introduced him to both of us and at the same time told him what we wished to do. This respondent immediately opened up conversation with Mr. Grayson by telling him that we had practically arranged a loan of $100,000 on the property which would net us about $98,000 out of which the $75,000 first trust was to be paid, and the balance, $23,000, was to be appropriated as far as it would go to the payment of the second trust creditors, and we then asked him how much he would be willing to scale his claim stating that we were just about to start to see him thinking
82 that if the larger creditors would not be willing to make some concessions the arrangement above referred to could not go through. This respondent was met by Mr. Grayson with the proposition that if this respondent could not give him a check for $5,500 he could not turn the notes over to us. This was after the explanation which this respondent had given him as to the loan, all of which he affected to misunderstand. This respondent again explained to him what we were trying to do, told him that we had no $5,500 to give him, and that if we were met in the same manner by the other holders of the second trust notes the arrangement could not possibly go through. After some little other talk he then said that if this respondent would give him a check for $5000 that I could take the notes, and this respondent again explained to him that I could not give him a check for $5000; that the whole transaction depended upon our ability to get the $100,000 loan through. He left with the statement that when we got ready to give him $5,000 to come and see him and this respondent asked him if he would put that in writing and he said no. Upon Mr. Haller's assurance that Mr. Grayson, notwithstanding his affected misinterpretation of our advances, would stand by his tentative offer of $5,000, at Haller's suggestion we then went to see a Mr. Muddiman who met us pleasantly and agreed to knock off ten per cent. of his claim. After some little talk he further agreed that if it became necessary he would do better than that. Mr. Wood and this respondent then went down 9th street below F to see an electrical light man, but he was not in. We then, at Mr. Wood's suggestion, went up on 14th street to see two of the holders of these notes but neither one of them was in and we saw

neither. We then came back to the 9th Street man
83 and he was not in and we gave it up for the day. Shortly after that we were informed by Mr. Lampton that he could not arrange the loan. We then abandoned the idea of refunding the mortgage debt of the flats property, ceased further negotiations and since that time we have not seen any of the holders of the second trust notes nor had any communication with them directly or indirectly, nor has anybody for this respondent, or, on information and belief, Wood, nor has any offer been made by this respondent or by Mr. Wood with our knowledge or concurrence, for any of this paper. It is true a gentleman by the name of Henderson who called at Mr. Wood's house on one occasion when this respondent happened to be there and introduced himself as one of the holders of these notes, wanted to know if we wanted to buy it or could do anything with it. We had a talk with him and explained the situation to him and told him that we did not want the notes at any price and he left assuring us that if we ever wanted his notes we could buy them at 50 cents on the dollar.

10. For answer to this paragraph this respondent adopts the answer of said Wood and makes the same part hereof, and further says that he denies that he is, or claims to be, the holder of the two notes deposited with the Gaithersburg bank.

11. This respondent denies that he or said Wood have formed any designs to prevent the sale of the flats property at a sufficient price to pay the second trust creditors, or that they or either of them did or sought to do any act for that purpose. The fact is, this respondent acquired his interest both in the flats property and that adjoining it by payment of full value; and he denies that he has any interest in the sacrifice of the flats property. The con-
84 versation with Mr. Grayson at the flats property referred to by him in this paragraph of the bill while partly true, arose in this way: This respondent went to the flats to see Mr. Wood who then had charge of it and found Mr. Grayson there and just about to leave. Mr. Wood appealed to this respondent as to whether *nor* not he had done right in refusing to turn over to Mr. Grayson the amounts of money in his hands that had accrued from the rents and before answering this respondent asked Mr. Grayson what in the event of Mr. Wood's turning this money over to him and the refusal of B. H. Warner to take it would he do with it and he declined to answer; would not inform us what he would do with it under those circumstances, but did inform us as is stated there, that he and the creditors would make up and pay that interest provided it would be accepted, to which this respondent said: "Mr. Grayson default has been made in the payment of the interest which makes all of the notes secured under the Warner & Wine deed of trust due. Mr. Warner may or may not accept this interest. If he does not I want to know what you are going to do with this money" and he declined to answer; said he would not tell us and I said to him then "You cannot get the money because it is just as safe in our hands as in yours." We then entered into general conversa-

tion in the course of which this respondent said to him as he seemed to be very sore about the matter, that it was a very unfortunate transaction for all hands, that he as well as quite a number of others had their labor and material and money in there but that they were in no worse condition than we were; that we had as much if not more than he had in it and that we were just as anxious and had just as much right to get our money out of it as he had to get his, to which he acceded and the conversation
85 proceeded along these lines. This respondent informed him that Mr. Wood had thoroughly demonstrated to his satisfaction and mine that under the present conditions with the mortgages drawing 6% the probabilities all were that some of us would lose money and he had no right to expect us to lose our money for his benefit. That we were under no legal or moral obligations to pay him one cent, that we were not the owners of the property when he took his risk and that he ought to have known what he was doing when he took it; that as far as we were concerned we were perfectly satisfied that our money so far as the flats property was concerned was gone; that in our opinion the flats would not bring the amount of money secured by the trusts on it and that therefore we did not intend to have anything more to do with the flats and that the only chance we had for our money was in the ground surrounding the building. Mr. Grayson asked some questions which clearly to my mind indicated that he thought we had vey little, if any, money in the transaction, and this respondent informed him that we had, both Mr. Wood and myself, considerable money there, more than this respondent cared to have in that condition or tied up in that shape, but that we hoped to be able to get out of the ground adjacent the amount we had there. This belief was based upon a statement made by B. H. Warner and other real estate men as to the value of the ground and the amount of liens at that time on it. He then asked what we would take for the ground surrounding the building to which this respondent answered, "I do not know as I have never had a conference with Mr. Wood as to how much we would be willing to take, nor had I made any calculations as to just how much I had in it, or he, Wood, had in it, but from what I knew in a general way from Wood's statements and what it had cost me
86 I did not know what we would take, but I thought it would be high priced ground," or words to that effect. If the words contained in quotation marks in the 11th paragraph of the bill that I "did not know but it would be high enough" were spoken by me they were spoken in a half jocular spirit and I intended to signify thereby that the land would have to bring a price high enough to let me and Mr. Wood out.

12 and 13. This defendant for answer to these paragraphs, adopts the answer of the said defendant Wood, and makes the same part hereof; and he denies that the parties claiming under said first and second trusts, have any equitable right to have said strip included in said trusts, and he is advised and so avers and insists that this court is without authority to take the property of this defendant and

the said defendant Wood from them and bestow it upon the beneficiaries under said trusts.

14. This defendant is advised that he is not required to answer this paragraph of the bill.

Further answering, this defendant says that the said complainants have not in and by their said bill made or stated any such case as entitled them to the relief sought or to any other relief against this defendant. And he claims the same benefit of this objection as if raised by demurrer. And this defendant having fully answered, prays to be hence dismissed with his costs.

H. MAURICE TALBOTT.

JOHN RIDOUT,
EUGENE CARUSI & SONS,
Att'ys for Respondent.

87 DISTRICT OF COLUMBIA, *To wit:*

I have read the foregoing amended answer by me subscribed and know the contents thereof and the matters and things therein stated as of my personal knowledge are true and those stated upon information and belief I believe to be true.

H. MAURICE TALBOTT.

Subscribed and sworn to before me this 17th day of October, 1900.

EUGENE D. CARUSI,
[SEAL.] *Notary Public, D. C.*

Depositions on Behalf of Complainants.

Filed Apr. 14, 1902.

* * * * * * *

88 WASHINGTON, D. C., *Sept.* 23, 1901.

Met, pursuant to notice, at one thirty o'clock p. m., No. 410 Fifth street northwest. Present, Messrs. J. J. Darlington and Jesse E. Potbury, for complainants and intervenor, Fred Drew, and Messrs. John Ridout and Charles F. Carusi, of Eugene Carusi & Sons, for
89 defendants H. Maurice Talbott, Frank I. Wood and The First National Bank of Gaithersburg; whereupon, Mr. David C. Grayson, Mr. William J. McClure, and Mr. George H. Zellers, complainants, having been first named, duly affirmed, and the second and third mentioned, duly sworn, testified on behalf of the complainants as is hereinafter respectively set forth.

(Stipulation.—It is stipulated between counsel that the deed from Alice S. Hill to Nicholas T. Haller, conveying lots one and two, in block forty-five (45), on January 13, 1897, set forth in paragraph 3 of the bill; the deed of trust from Nicholas T. Haller to Brainard H. Warner and Louis D. Wine, trustees, January 22, 1897, set forth in the said 3rd paragraph of the bill; the deed of trust from the said Haller to Frederick W. McReynolds and James H. Meriwether upon

the portions of lots one and two, in W. C. Hill's subdivision of the Middle Grounds of the Columbia university, now called University Park, not included in the deed to Warner & Wine, to secure the six promissory notes of the defendant Haller further set forth in said 3rd paragraph of the bill; the deed of trust from said Haller on December 20, 1897, to David C. Grayson and John C. Heald, as set forth in the 5th paragraph of the bill; the deed of trust from Nicholas T. Haller to Alexander H. Holt and Frank A. Sebring and the deed from said Haller to Bernard A. Duke as set forth in the 7th paragraph of the bill; the deed from the said Haller to the said Wood dated the 31st day of July, 1898, and the deed from the defendant Duke to the defendant Wood, dated the 13th day of March, 1899, referred to in the 9th paragraph of the bill are substantially to the effect as set forth in said bill, with the right
90 to any of the parties to file copies of any of said deeds at any time during the taking of this testimony or to refer to the record thereof at any hearing of the case; subject, however, to all legal objections as to the competency and relevancy of the said several deeds; objection being offered on behalf of the defendants H. Maurice Talbott, Frank I. Wood and The First National Bank of Gaithersburg to the introduction of any of the said deeds of a date subsequent to December 20, 1897, the date of the deed of trust from the said Haller to the said Grayson & Heald, as irrelevant in this cause.

It is further stipulated, subject to confirmation that Exhibit A, filed with the bill is a copy of the advertisement of sale made by the defendants Warner & Wine under the deed of trust to said defendants; to which the same objection is offered.

(Counsel for complainants offer in evidence the copy of the deed of trust of December 20, 1897, from Nicholas T. Haller to the complainants Grayson & Heald, referred to in paragraph 5 of the bill, marked "Exhibit No. 1;" to which, objection is offered on the ground that it is irrelevant.

(Mr. Darlington also offers in evidence "Exhibit B," filed with the original bill, being a plat of the ground in controversy, the portion thereof colored blue representing the property covered by the deeds of trust to Warner & Wine and to Grayson & Heald, the remainder of the ground representing the ground covered by
91 the deed of trust to McReynolds & Meriwether, the portion in red representing the ten-foot strip adjacent to the Victoria Flats property referred to in the bill.

Objection is taken to the plat in so far as the segregating the ten-foot is intended to show the existence of said strip independently of the ground conveyed by the trust to McReynolds & Meriwether, or as intending to prove the contentions set up in the bill as to the separate existence of any such strip of ten feet.

(Mr. Darlington also offers in evidence "Exhibit C," filed with the original bill, being a copy of the bill of complaint in the case of Frank I. Wood against Bernard A. Duke, equity No. 20,759, referred to in paragraph 12 of the bill; which is objected to on the ground of irrelevancy.

Mr. DAVID C. GRAYSON.

Direct examination.

By Mr. DARLINGTON:

Q. Mr. Grayson, please state your full name? A. David C. Grayson.

Q. You are one of the complainants in this cause? A. Yes, sir.

Q. Are you the David C. Grayson who is referred to as one of the trustees in the deed of trust of December 20, 1897, from Nicholas T. Haller to David C. Grayson and John C. Heald? A. Yes, sir.

92 Q. What was your connection originally with the Victoria Flats property? A. In the first place my firm furnished all the lumber for the building.

Q. Were you paid? A. No, sir; not all of it.

Q. How much was unpaid, and still due? A. I don't know exactly, without figuring.

Q. In what form is that indebtedness at present? A. In promissory notes secured by a second deed of trust.

(Question and answer objected to, as irrelevant.)

Q. How many notes? A. Four.

Q. What is the deed of trust securing these four notes? A. A deed of trust to Grayson & Heald, of December 20, 1897.

Q. Have you those notes with you? A. Yes, sir. (The witness produces four promissory notes, all bearing date December 20, 1897, each for $1449.91, payable respectively one, two, three and four years from date, with interest at the rate of six per centum per annum, payable semi-annually, to the order of William J. McClure, and by the said William J. McClure endorsed without recourse.)

Q. Why were these notes made payable to the order of William J. McClure? A. I don't know that I can answer that, I think Mr. Heald made that suggestion, to my recollection.

Q. I observe in the deed of trust all the notes are made payable to William J. McClure: Was he one of the creditors? A. Yes, sir.

93 Q. Do you know what he did with the notes? A. The notes were signed, I think, in Mr. Heald's office, if I recollect, and I think Mr. Heald distributed the notes.

Q. To whom? A. Among the creditors. I think Mr. McClure made his endorsement there.

Q. An endorsement like the one upon your note which is here produced, without recourse? A. Yes, sir.

Q. I observe in the deed of trust securing these notes there is also provision made for securing $10,350.00 in promissory notes to the order of Charles L. Frailey. Can you explain that part of the transaction? A. There was a deed of trust to that amount on the flats, put on subsequent to our furnishing the material. We, of course, had the right of lien prior to that, but when we came to settle this

matter—we held a meeting of all the creditors we thought advisable—and invited Mr. Heald to that meeting.

Q. Who was he? A. I suppose he held the second trust. We at least were told that. He came to that meeting and it was arranged we would all go in and take a second trust upon the property, we waiving our right of lien to that extent.

Q. What, if you know, did the claim Heald represented stand for? A. I understood, money Mr. Heald had loaned, to Haller on this building.

Q. At the time of taking this second trust what knowledge, if any, had you that the Victoria Flats building was not fully comprised within the ground specified in that deed? A. None what-
94 ever. I never had any suspicion or any intimation otherwise.

Q. What was your understanding and belief at that time? A. I was led to believe, and thought so—that the entire ground belonged to Mr. Haller; and I did not know anything about the dimensions of the building at all.

Q. What belief, knowledge, suspicion or intimation had you at that time that any part of that building rested upon, or extended over upon, ground not covered by your deed of trust? A. None at all.

(Mr. CARUSI: So far as that question calls for the belief or impressions of the witness it is objected to, as incompetent.)

Q. I observe in this deed of trust to Heald and yourself a trust to the trustees named therein to collect the rents and profits of the building over and above the amount necessary to pay interest on the debt secured by different trusts on the property, taxes, insurance and the repairs and running expenses and to apply the said net rents and profits on the notes secured by the second trust: What was done pursuant to that provision towards collecting the rents? A. B. H. Warner & Co. was collecting them for Mr. Haller.

Q. After this deed of trust to Mr. Heald and yourself, containing this power to collect the rents, was made, what arrangement between yourselves and Mr. Warner was made? A. It was made by general consent of the creditors present at that meeting to leave the property in the hands of B. H. Warner & Co.

Q. Were you present? A. Yes.

95 Q. What did B. H. Warner & Co. do with the rents under that agreement? A. They collected the rents and turned them all above that expended for repairs and charges, over to me and Mr. Heald, the trustees under this trust.

(Mr. CARUSI: The same objection.)

Q. How far, if you know, did the rents so turned over to Mr. Heald and yourself prove sufficient to pay interest on the second trust notes?

(Objected to, as calling for hearsay testimony.)

A. I think there were two installments of interest paid, so far as I remember.

Q. That is to say, the net rents, after paying the interest on the first encumbrance, the taxes and other charges, were sufficient to pay the first two semi-annual installments on the second trust notes: Is that what you state?

(Objected to, as leading.)

A. Yes, sir.

Q. Under what circumstances, if you know, was the property taken out of the hands of B. H. Warner & Co.? A. Well, the understanding I had was that Wood would reduce expenses by not having any commission to pay.

Q. From whom did you get that understanding? A. I think Mr. Heald and I both had that understanding.

Q. With whom? A. Mr. Heald.

(Objected to, as hearsay.)

Q. Did Mr. Wood have anything to say to you on that
96 subject? A. I don't know that he did personally.

Q. When did you first learn that the Victoria flats was dependent for light on the south and west sides, upon the adjacent property, and that its porches, cement walks and areaways extended over the adjacent property and beyond the metes and bounds contained in the trust to you and Heald? A. I could not tell exactly when it was. The only incident connected with it was I remember, when some interest became due on the first trust. Mr. McReynolds had threatened to sell or had advertised; I don't remember whether he had advertised, but he threatened to sell.

Q. From whom did you learn that? A. I think I learned that from Mr. Heald, because I know he told me.

(Objection to what Mr. Heald told witness.)

Q. Did you ever have any talk with Wood or Talbott upon the subject of the ground around the flats? A. Yes.

Q. When? A. The first time I ever talked with him about the ground around the flats was in the Patent Office, in August, 1899, after I had seen the flats advertised to sell.

Q. By whom? A. The trustees under the first trust.

Q. What trustees? A. I don't remember who held the first trust. They had advertised the property for sale.

Q. You must remember there are two first trusts, one on the Victoria flats and one to McReynolds? A. I am speaking of the first trust on the flats.

Q. Do you refer to the advertisement mentioned in the bill
97 in Exhibit A? A. Yes, sir.

Q. When you became aware of that what did you do? A. I went to see Mr. Wood in his office and asked him why it was the property was advertised for sale.

Q. Tell us what occurred between you? A. He said he did not have the money to pay the interest.

Q. What was said between you and him about the ten foot strip? A. I asked him then if he had been to Warner and offered to pay the money, or asked for indulgence, if they would wait until the money could be gotten to pay, and he said he had not. I told him I thought that was a step he should take before allowing the property to be advertised.

(Objected to, as not responsive, being the mere opinion of the witness.)

Ans. con. Then he asked me if I knew that the ground surrounding the flats came up to the ground around the flats; and he said to me they intended to make their money out of the ground; that was his assertion. I asked him then if he was aware that the ground belonged to Mr. Haller at the time this deed was put on; he said that made no difference to him.

(Objected to in so far as it relates to statements made by Wood concerning the surrounding ground.)

Q. Was this at the Patent Office interview? A. Yes sir.

Q. When did you next have any conversation with either Wood or Talbott upon this subject?

(Mr. RIDOUT: All questions seeking to elicit conversations regarding the record of the Grayson & Heald trust are objected to as irrelevant.)

98 A. The next time I had a conversation with him was later on in the same month of August, when I went to his house on Massachusetts avenue.

Q. Tell us what took place. A. I went there to offer to advance money enough to pay the interest on the first trust.

Q. What took place between you? A. He refused to receive it, and he told me before I left, he would see Talbott and let me know. So, I suppose it was, perhaps, four or five days after that we made arrangements to meet.

(Stipulation.—It is stipulated that the recital of the deed of trust to Grayson & Heald shall be taken as *prima facie* evidence of the indebtedness represented by the promissory notes secured by it.)

Q. Annexed to the answer of the defendant Wood to the rule to show cause, filed in this case, on September 11, 1899, I find two letters purporting to be signed by you, one dated August 22d, 1899, and the other, August 25, 1899: state whether they are letters which you wrote to Mr. Wood? A. Yes, sir. The first one I delivered to Mr. Wood in person at his house.

Q. That fixes the date of your interview? A. Yes, sir. And the next one was delivered to Mr. Wood and Talbott both, at the Victoria flats.

Q. That then fixes the date of the second interview? A. I think

so. I think it was the same day, or if not it was very near that time.

Q. Please state what took place between you at this interview at the flats?

(Objected to on the same ground, irrelevance.)

99 A. This is all relating to ground around the flats?

Q. Tell everything that took place at the flats interview? A. I gave them this letter of August 25th, a demand I made upon them for the money to pay the interest on the first mortgage, and they intimated as much as that they were not willing to turn it over to me, they did not know that Warner would take the money. I offered to them if they would go with me and pay their part I would pay the balance. They did not agree to that. Then Mr. Talbott said that Mr. Wood was tired of managing the property in the interest of the second trust holders, and Mr. Wood spoke up and said they intended to make their money out of the ground, and I think Mr. Talbott reiterated that fact. Then I asked them the question what they would want for the ground, or its value. I don't know the words exactly of the answer but Mr. Talbott said he did not know, but it would be high enough.

(The testimony of witness relating to statements made by Talbott and Wood as to intentions concerning the flats, objected to as irrelevant.)

Q. What was said about the ten-foot strip being the key to the situation there?

(Objected to, as grossly leading.)

A. That was mentioned.

Q. By whom? A. By both of them. They said—I don't know about the ten feet being the key; but the ground, they said, if anybody bought the property they could shut it up, could close the windows up on the south and west sides if anybody bought it.

Q. Did you have any previous interviews with Mr. Talbott
100 about this matter? A. Yes, sir, I had about the property, but not about the ground. The first time I ever met Mr. Talbott or Wood was at Mr. Haller's office. I understood they wanted to see me and I went there on business; and in conversation there they told me they were trying to make arrangements to borrow money to pay off this first trust and the second trust on the property, and asked me what discount I would be willing to knock off. I said: "Gentlemen, are you prepared to back up any offer with the cash, for I will not give you any option to speculate upon."

(Mr. CARUSI: We object to this question and answer, as irrelevant, the interview taking place after the 20th of December, 1897, the date that is stated in the answer.)

Q. Have you any means of fixing the date of this conversation with Talbott? A. No, sir, I have not. I think, though, it was in the early part of the summer of 1899, I think.

Q. Was it before or after the interview that was had at the Patent Office? A. Before that.

Q. Are you a property holder? A. Yes, sir.

Q. Are you familiar with real estate and its value in Washington here? A. Well I don't claim to be an expert in real estate.

Q. Have you bought and sold real estate? A. Yes, sir.

Q. For how many years? A. About twenty, I suppose, or twenty-five.

101 Q. From your knowledge of real estate in this jurisdiction, and your experience with it what can you tell us as to the possible sale of the Victoria flats advantageously without the ten-foot strip?

(Objection to the question, on the ground that the witness has not shown himself qualified.)

A. I don't think it would sell advantageously without it.

Q. What obstacle to such a sale occurs to you? A. The fact that there might be persons who would fear to buy because it might shut out the windows on the south and west, and I think it would not have ventilation from there.

Q. To what extent would closing the windows on the south and west sides and the removal of the porches, cement walks and area ways affect the value of the flats property?

(Objected to on the same ground—irrelevant to any issues in this cause.)

A. I think it would damage it very greatly.

(Cross-examination suspended for the present.)

DAVID C. GRAYSON.

Sworn to before me as aforesaid and subscribed in the presence of counsel for complainant, this 1" day of October, A. D. 1901.

T. H. FITNAM, *Examiner.*

Mr. WILLIAM J. MCCLURE.

Direct examination.

By Mr. DARLINGTON:

102 Q. State your name? A. William J. McClure.

Q. You are one of the complainants in this suit, I believe? A. Yes, sir.

Q. And you are also one of the persons secured by the second deed of trust? A. Yes, sir.

Q. Please produce the notes you hold secured under that trust?

Witness produces three notes of Nicholas T. Haller, all dated December 20, 1897, for $1128.59 each, with interest at the rate of six per centum per annum, payable semi-annually.

Q. Was any proposition from either Mr. Wood or Mr. Talbott made to you to purchase these notes?

(Objected to as leading and irrelevant.)

A. Yes, sir.

Q. By whom was that overture made? A. By Mr. Wood and Mr. Duke. Mr. Wood and Mr. Duke came to my house and asked me what I would take in cash for my claim. I told them I would take seventy-five per cent. cash and the other twenty-five per cent. in a second trust. Mr. Wood told me if they would accept my proposition that he could do something with the building. He had gone and seen Mr. Grayson.

Q. How do you know he did? A. He told me he did, and he would not give him any satisfaction then. He also told me that there was one or two that he would like to see get their money, but that there were others, (and that Grayson was one) who, if he could prevent it, would not get a dollar.

103 (Question and answer objected to, as irrelevant.)

Q. I observe that on or about the 28th of December, 1897, Mr. Haller made a deed of trust to Alexander H. Holt and Frank A. Sebring conveying the Victoria Flats property to secure an alleged indebtedness of $34,000.00 to you and Mr. Oscar Roome; what do you know of that transaction?

(Objected to, as irrelevant.)

A. Nothing at all.

Q. Are you acquainted with Oscar Roome? A. No, sir.

Q. What indebtedness, if any, did Mr. Haller owe you, except that represented by the promissory notes proved today? A. He represented one more note besides that $1128.59.

Q. Did you at any time endorse $34,000.00 in promissory notes, or any other promissory notes, payable to Mr. Roome and yourself, made by Haller? A. No, sir.

Q. When did you first know of the third deed of trust to secure $34,000.00 to Mr. Roome and yourself having been executed?

(The same objection.)

A. The first intimation was when you asked me in this office.

Q. About when was that, if you know? A. I could not state, but it was about the time we had the meeting here.

Q. About the time of this affidavit I hand you (handing witness affidavit filed in this suit September 6, 1899)? A. Yes, sir.

Q. I want to ask you whether these promissory notes se-
104 cured by the second trust filed here have been paid? A. There were three items of six months' interest each.

Q. Besides that eighteen months' interest what if anything has been paid on these notes? A. Nothing at all.

Q. By whom was the last interest paid? A. By B. H. Warner & Co., receivers in this case.

Q. At the time you accepted these second trust notes what knowledge or information had you that the ground described in the second trust did not enclose all the ground that the Victoria flats was built upon or extended over? A. I always understood that there was ten feet of ground laid outside the building for an air-space. I built the area-ways there with the understanding that the building owned the ground.

Q. What was your understanding and belief as to whether the deed of trust covered that ten feet? A. I always understood that the deed of trust covered the ten feet front all around the building.

(Cross-examination deferred.)

WILLIAM J. McCLURE.

Mr. GEORGE H. ZELLERS.

Direct examination.

By Mr. DARLINGTON:

Q. Please state your full name? A. George H. Zellers.

Q. You are one of the complainants in this case? A. Yes, sir.

Q. Are you doing business alone or as a firm? A. As a firm, Zellers & Co.

105 Q. How many, if any, of these second trust notes secured by the Grayson & Heald deed of trust does your firm hold? A. We own eight. We bought four and there were four given in part payment, or the final payment for the heating apparatus.

Q. Have you the eight notes you refer to? A. Yes, sir.

(Witness produces four of these notes for $743.11 each, and four for $127.33 each all made by Nicholas T. Haller, dated December 20, 1897, payable to the order of William J. McClure, with six per centum interest payable semi-annually, and endorsed by the said William J. McClure without recourse.)

Q. What has been paid on account of these notes? A. Eighteen months' interest.

Q. With the exception of that interest what has been paid? A. Nothing at all.

Q. The balance is still due? A. Yes, sir.

Q. If any offer to purchase these notes at a discount from you was made by any person state by whom such offer was made?

(Objected to, as irrelevant.)

A. There was word left for me to see Mr. Wood. He wanted to see me with reference to the notes. I went to see him, on Massachusetts avenue and he asked me what we would take for the notes. I think, to the best of my recollection there was three, or possibly four months' interest due then on the notes. I said, "Wood, if you will give us your check at once we will sell you the notes at par

106 less the accrued interest. That will not hold good, only for a certain time." One or two days I think it was. I think

it was probably on a Friday or Saturday, and I gave him until Monday. So he said they would try to see what they could do to pay it.

Q. Did he see you again? A. Yes, sir. Mr. Haller told me where his office was and requested me to go and see him. I went there and Mr. Wood came out and wanted to know what we would do, and I told him we would sell at par; and he mentioned Mr. Grayson, he said if it were not for Mr. Grayson they could negotiate the loan and carry it through, and he said that if he had his way Mr. Grayson should not get a dollar. I then said, There is more in this property, we can carry it through as well as you can. There was nothing else said.

Q. At the time you accepted these second trust notes what knowledge, if any, had you that the Victoria Flats building extended on other ground than your trust covered? A. None at all.

Q. What was your understanding and belief at the time you accepted these second trust notes as to whether or not the ground conveyed by that second trust carried the entire ground on which the Victoria flats was built? A. We had not the least idea that the flats was on any other ground than what belonged to it.

Q. What do you mean by ground belonging to it? A. The plat that was laid out to put the building on.

(Cross-examination deferred.)

GEORGE H. ZELLERS.

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107 Mrs. IDA V. MCCLURE.

Direct examination.

By Mr. DARLINGTON:

(Mr. DARLINGTON: I offer Mrs. McClure as a witness on behalf of all the complainants except the complainant William J. McClure.

(Mr. RIDOUT: The competency of this witness is objected to on the ground that within the spirit of the rule she is incompetent, inasmuch as her testimony must affect the interest of her husband if it be competent at all.)

Q. Please state your full name? A. Ida V. McClure.

Q. What is your relationship to Mr. William J. McClure?

108 A. I am his wife.

Q. Were you present at an interview between himself and the defendant Frank I. Wood at which the latter spoke of purchasing Mr. William J. McClure's claims against the Victoria flats? A. I was.

Q. Who else was present? A. No one but Mr. McClure, myself, Mr. Duke and Mr. Wood.

Q. What, if anything, did Mr. Wood say at that time about Mr. Grayson and other parties?

(Question objected to, as irrelevant and incompetent.)

A. He asked Mr. McClure what he would take for his claim against the Victoria flats. He said seventy-five cents on the dollar in cash and twenty-five cents in a second deed of trust.

Q. What did Mr. Wood say then? A. He spoke about creditors he would like to see paid, but as for Mr. Grayson he would not get a dollar if it lay in his power to keep him out of it.

(Same objection to the answer.
(Cross-examination waived.

IDA V. McCLURE.

Sworn to before me as aforesaid, and subscribed, this 12th day of October, A. D., 1901.

T. H. FITNAM, *Examiner.*

(Hereupon, Messrs. David C. Grayson, William J. McClure,
109 and George H. Zellers, witnesses having testified on behalf of complainants, being present, counsel for complainant suggests to counsel for defendants that said witnesses are here and available for cross-examination; whereupon, Mr. Ridout, of counsel for defendants, states:

We do not care to cross-examine any of those witnesses unless something developes later. We cannot have them reproduced unless we can justify it.

Mr. DARLINGTON: The witnesses are here for cross-examination and we must decline to have the cross-examination indefinitely postponed.)

Adjourned, to Monday, the 30th inst., at half past one o'clock p. m.

T. H. FITNAM, *Examiner.*

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Mr. JOHN C. HEALD.

Direct examination.

By Mr. DARLINGTON:

Q. Kindly state your name? A. John C. Heald, fifty-one
110 years of age, resident of the District of Columbia, attorney at law.

Q. It has been stated here that you prepared the deed of trust from Mr. Haller to Grayson & Heald, being the second encumbrance upon the Victoria Flats property: Do you recall preparing it? A. I do, and did prepare the deed of trust and the notes.

Q. Will you please state why the notes were made payable to William J. McClure? A. For the reason that there were a great many creditors, and a great many notes to be prepared and it was deemed simpler to have the notes all payable to the order of one man and let him endorse them without recourse; and McClure being the

contractor on the building the notes were made payable to his order. That is the only reason for preparing the notes in that manner.

Q. What did he do with them? A. I delivered them, I think, to Mr. E. J. Hannan.

Q. That ended your connection with them? A. Yes, except so far as some of the notes came back to me endorsed, for certain clients of mine.

Q. Please tell us what you know of the withdrawal of the Victoria Flats property from B. H. Warner & Co., and the assumption of the collection of its rents, and management by Mr. Wood or Talbott?

(Objected to on the ground that question is irrelevant.)

A. To the best of my recollection Mr. Wood and Talbott stated to me that they thought Mr. Wood could manage the property equally as well as B. H. Warner & Co., and that they intended to manage it, that Mr. Wood would manage the property and thereby
111 save the commission which had been paid to B. H. Warner & Co. As a holder of some of the notes secured by that trust, representing some holders and others who owned them I made no objection, I thought if the commission could be saved it would be well to save it.

Q. You are the same John C. Heald who is a trustee under the Grayson & Heald trust? A. I am.

By Mr. CARUSI:

Q. How much of the debt secured by the Grayson & Heald trust do you actually own, and how much do you represent? A. I represent ten thousand dollars of the second trust. I own, I think, in the neighborhood of $1,200 or $1,500.

JOHN C. HEALD.

Sworn to before me as aforesaid, and subscribed this 8th day of October, A. D. 1901.

T. H. FITNAM, *Examiner.*

Mr. BERNARD A. DUKE.

Direct examination.

By Mr. DARLINGTON:

Q. State your name, please? A. Bernard A. Duke.

Q. Are you the Bernard A. Duke sued as a defendant in this cause? A. Yes, sir.

112 Q. Were you ever the holder of any promissory notes secured upon the Victoria Flats property? A. No, not on the Victoria; no, sir.

Q. You are quite sure about that? A. On the Victoria?

Q. Yes? A. Yes, sir.

Q. You never owned any promissory notes secured on that property? A. On the Victoria, no, sir.

Q. Were you ever requested by Mr. Wood, or any other party in interest, to close the windows on the west and south sides of the Victoria Flats building?

(Objected to, as immaterial.)

A. Yes, sir.
Q. Did you do it? A. No, sir.
Q. Why?

(Same objection.)

A. I don't know why.
Q. Who asked you to close them? A. I don't remember who asked me, probably Mr. Wood or somebody.
Q. I wish you would think a moment, and see—— A. It has been so far back I cannot remember.
Q. Did you decline to close them? A. Well, they are not closed; nothing said about it one way or the other.
Q. Somebody—you don't know who—asked you to close them, and you don't know whether you declined or not: Is that
113 correct? A. I don't remember away so far.
Q. Was there any suit brought against you as owner of that property, that you know of?

(Objected to, on the same ground—as immaterial.)

A. Yes sir.
Q. By whom? A. By Mr. Wood.
Q. Did you and he have any negotiation or conference that you remember, about it, before that suit was brought? A. No, sir.
Q. What were your relations to the Victoria Flats property at the time? A. Which time?
Q. The time that suit was brought? A. I just held the title as trustee.
Q. As trustee for whom? A. For Mr. Wood and Mr. Talbott.
Q. You were claiming no interest then? A. No, sir.
Q. And had no interest? A. That answer of mine covers that.
Q. You mean the answer you filed in this suit? A. Yes, sir.
Q. Why then did you not close up the windows without being sued by Mr. Wood?

(Objected to, as irrelevant.)

A. It was not for me to close.
Q. Whose business was it to close them, if the closing was desired?

(Objected to, as —.)

A. I don't know.
Q. Why do you say it was not for you to close them? A.
114 Because I had no interest in the property.
Q. Did you ever oppose the closing of these windows, or object to it? A. I did not know about it until I got the suit.

Q. Then no one had asked you to close them before suit was brought?

(Objected to, as —)

A. They told me they ought to be closed, that's all.

Q. Who told you they ought to be closed? A. Mr. Wood.

Q. What did you say? A. I don't know what I said about it.

Q. Who had charge of the Victoria flats at that time? A. Mr. Wood.

Q. Did you ever have charge of them yourself? A. No, sir.

Q. Did you ever interfere in any manner with the conduct or management of that property? A. No, sir.

(Exceptions noted to all these questions.)

Q. How were you employed at that time, what was your occupation? A. Collector.

Q. For whom? A. For everybody, general collecting business.

Q. Where did Wood see you when he wanted the windows to be closed? A. I don't remember where he saw me.

Q. Did he ask you to do anything about it? A. Not that I remember.

Q. Had you anything to do with the conveying of the
115 Victoria flats to you? A. How do you mean, Have anything to do?

Q. Did you cause it to be done? A. No, Mr. Haller wanted me to carry the title for him and Mr. Wood.

Q. Did you ever see the deed? A. Which deed?

Q. The deed conveying, deeding that property to you? A. Yes, sir.

Q. When? A. When it was conveyed to me.

Q. Have you got it? A. No, sir.

Q. Did you ever have it? A. Yes, sir. I put it on the record.

Q. Then what did you do with it? A. I left it on the record.

Q. Have you ever seen it since? A. No, sir.

Q. Please state how you came to deed to Wood the ten-foot strip around that building?

(Mr. CARUSI: Objected to, as there is no evidence of the existence of any ten-foot strip.)

A. Mr. Wood was the owner of the property and he asked me to deed him the balance of the ground.

Q. What do you mean by the balance of the ground? A. He owned the lot next to it and said he wanted to get the other piece that belonged to it for his lot.

Q. You were trustee for Wood and Haller? A. When the Victoria building lot was deeded to me by metes and bounds I
116 held the trust for Wood and Haller, then Haller sold out his interest to Talbott, then Wood had me deed to him the ground that the Victoria flats was not on.

Q. You had no interest in the transaction at all yourself? A. No, sir.

Q. You simply did what they told you? A. Yes, sir, simply as trustee.

Q. Do you know of a release by Holt & Sebring to you of a deed of trust on the Victoria Flats property? A. There was no release ever made to me by Holt & Sebring that I know of.

Q. Do you know of a release executed by these gentlemen representing you as holder of a $34,000.00 incumbrance secured by trust on that property? A. Mr. Haller had a lot of notes in his safe, and gave to me a lot of notes saying that as holder of the notes on the ground around the Victoria flats that Mr. Wood and Talbott wanted released.

Q. You were not the holder? A. I was the nominal holder.

Q. You knew they did not belong to you? A. They were given to me just to get the release, to save trouble.

Q. You knew you were not the holder? A. I was nominally.

Q. You knew you had no interest in them? A. Yes, sir; I had no interest in them.

(Cross-examination deferred.)

BERNARD A. DUKE.

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117 Mr. NICHOLAS T. HALLER.

Direct examination.

By Mr. DARLINGTON:

Q. Please state your full name? A. Nicholas T. Haller.

Q. Are you the Mr. Haller who built the Victoria flats? A. I am.

Q. Is that building located on the ground on which you intended it to be located when you first prepared the plans? A. No, it was changed.

118 (Objection as to witness' intentions, as immaterial.)

Q. Why was the change made? A. By order of Justice Harlan.

(Same objection.)

Q. What did Judge Harlan have to say about it?

(Same objection offered, and additional objection, on the ground of hearsay.)

A. The deed given to me by Mrs. Hill was clear and did not provide for any restrictions. As I prepared my plans it set back fully twenty feet on Fourteenth street, and ten feet on Welling place, and when we began the work Justice Harlan sent his secretary to tell me of the restriction in the deed given by Sherman, which provided for a reservation of forty feet on Fourteenth street, and twenty feet on Welling place, and that if we did not set the building back he would get out an injunction.

Q. Is it your recollection that the building restriction in regard to Fourteen-street and Welling place was made by Hill or Sherman?

(Same objection.)

A. —.

(Cross-examination waived.)

N. T. HALLER.

Sworn to before me as aforesaid, and subscribed, this 14th day of October, A. D. 1901.

T. H. FITNAM, *Examiner.*

119 Mr. GEORGE W. F. SWARTZELL.

Direct examination.

By Mr. DARLINGTON:

Q. Mr. Swartzell, please state your full name, and occupation? A. George W. F. Swartzell, real estate.

Q. How long have you been in the real estate business? A. About twenty-four years.

Q. What has been the character of your experience in that business during that time? A. It has been general, chiefly in the management of rented property.

Q. What if any have been the occasions or means of acquiring information or knowledge as to the value of real estate and its salability in the District of Columbia? A. My opportunities have been general, I have a general knowledge of the business, of real estate.

Q. Have you been connected with any real estate firm or office? A. With the firm of B. H. Warner & Company.

Q. For how long a time? A. During the whole period I have been in the real estate business.

Q. Can you give us any information as to the extent of your firm's operations in selling and renting? A. The firm conducts a general business, and makes a specialty of selling property and making loans on real estate and collecting the rents from rented property.

Q. What I would like to get at is, some idea as to the extent of its operations in the form of rents and sales? A. I should say our business is extensive.

120 Q. Have you any connection with the property known as the Victoria flats? A. We have. Our firm now has that building in charge.

Q. Under the authority of whom? A. We represent the receivers.

Q. How long have you had it in charge? A. I do not recollect the date, but since the receivers were appointed.

Q. What, from your own knowledge of that property, and your general information in regard to real estate in this District, would be the effect upon the value of that property for use and occupation, of closing the windows and doors on the west and south sides, and removing the porches and areas on those sides?

(Question objected to, as immaterial.)

A. I should say the effect would be very serious—disastrous.

Q. To what extent proportionately, in your judgment, would such a proceeding reduce its capacity for producing income?

(Same objection, and then, for information, dates should be given.)

A. It would shut out the light on the south and west sides, and there are a number of apartments which could not part with that light, which would injure them very seriously.

Q. About what proportion of the building would be affected?

(Same objection as the last.)

A. It would affect two-thirds of the building, at least.

Q. What effect upon the salable value of the property
121 would the closing of those windows and doors, and the removal of the areas and porches have.

(Same objection.)

A. Closing the windows would seriously affect the income, and that, the salability of the property.

Q. To what extent, proportionately, in your judgment, would the price be affected?

(Same objection.)

A. It would depend upon how the income was disturbed. It would affect it very much, because the apartments on the south and west sides would be rendered practically unavailable, the income from them cut off or largely interfered with.

Q. How far, in your judgment, would the fact that the ground of the west and south sides was separated in ownership from the rest of the Victoria Flats property, and rendering or placing it within the power of the owner of this adjacent ground on the west and south to close the windows and doors on the south and west sides and remove the areas and porches on those sides affect the salable value of the property?

(Same objection.)

A. Next to having the windows closed the possibility of closing them at any time would be serious.

Q. It appears there is a first trust of seventy-five thousand dollars ($75,000.00) upon the building, represented by numerous notes: Are you able to tell us how many holders of these notes there are? A. There are about fifty-five, I should say.

Q. Where do they live?

(Same objection.)

122 A. They live in Washington, in Hodenauqua, Pennsylvania; New Orleans, La.; Boston, Mass.; Louisville, Ky.;

Wilmington, Del.; Poughkeepsie, N. Y.; New York city, Fredericksburg, Va., and Rockville, Md.

(Cross-examination waived.)

GEO. W. F. SWARTZELL.

Sworn to before me as aforesaid, and subscribed, this 14 day of October, A. D. 1901.

T. H. FITNAM, *Examiner.*

Mr. GEORGE C. ESHER.

Direct examination.

By Mr. DARLINGTON:

Q. Please state your name? A. George C. Esher.

Q. You are one of the holders of these second trust notes, are you? A. Yes, sir.

Q. What kind of work did you do on the Victoria flats? A. Stone work.

Q. What knowledge, if any, had you, when you did that work or took those notes, that the Victoria flats was not entirely upon the Victoria Flats ground?

(Same objection—immaterial.)

A. I thought it was all on that ground.

Q. Did anybody at any time try to buy your notes?

(Same objection.)

123 A. Yes, sir.

Q. Who was it? A. A gentleman by the name of Mr. Wood.

Q. Do you recognize him in the room here? A. I think so. This gentleman (indicating).

(Counsel for defendants call attention to the fact that witness indicates as Mr. Wood, a Mr. Duke, while Mr. Wood sat right alongside of the witness.)

Q. Do you know the name of the Mr. Wood that came to see you? A. I never met the gentleman. He told me his name was Wood, and he wanted to buy the notes, but I would not sell because he only offered a small sum; I think, twenty cents.

(Same objection to all this line of questions, immaterial.)

Q. What did he say when you refused to take the twenty cents?

(Objected to, as immaterial, and on the further ground that witness has shown that he was not talking to Mr. Wood, that he has been unable to identify Mr. Wood.)

A. He said, "If you don't take that I will see that you shall lose it all." I told him that was all right.

(Cross-examination waived.)

GEORGE C. ESHER.

Sworn to before me as aforesaid, and subscribed, this 15th day of October, A. D. 1901.

T. H. FITNAM, *Examiner.*

124 Mr. WILLIAM J. MCCLURE (recalled).

Direct examination.

By Mr. DARLINGTON:

Q. Mr. McClure please state whether at my request you have made an examination of the west and south walls of the Victoria flats for the purpose of ascertaining the number of windows and openings in these two sides?

(Objected to, as immaterial.)

A. I have.

Q. What are the openings on the west side of the building? A. There are thirty-five windows——

(Objection to the witness reading from the memorandum in his hand, as he is now doing.)

—thirty-six windows, seventeen doors, and four cellar windows on the west side. There are nineteen windows, five doors, and four cellar windows on the south side.

Q. What was the memorandum you were using, referred to by Mr. Ridout? A. This is a memorandum made as I counted the windows and doors in the building.

Q. Made by whom? A. By me.

Q. When? A. The evening I measured the building.

Q. Where? A. At the Victoria flats.

Q. When was it you made that examination? A. Wednesday evening.

Q. Of what week? A. This week.

125 & 126 Q. And this is Friday, the 4th day of October? A. Yes sir.

Q. What do these doors open out upon? A. Upon the porches on the south and west sides of the building.

Q. Did you measure how far these porches extend from the west wall of the building? A. Yes, sir.

Q. How far? A. Four feet, nine inches.

Q. Did you measure the extent of the area ways west and south of the west and south walls of the building? A. No, sir, I did not; I should judge them to be about eighteen inches.

(Objection to the opinion of the witness, and to all of this as immaterial.)

(Cross-examination waived.)

Openings corrected before signing.

WM. J. McCLURE.

Sworn to before me as aforesaid, and subscribed, this 17th day of October, A. D. 1901.

T. H. FITNAM, *Examiner.*

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127 In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

WASHINGTON, D. C., *October 25th*, 1901,
Friday, at 2 o'clock p. m.

Met, pursuant to agreement, at the office of Eugene Carusi & Sons, Columbian building, No. 416 Fifth street, northwest, on the day above indicated, to take testimony on behalf of the defendants in the above entitled cause.

Present: J. J. Darlington, Esq., of counsel for the complainants; Charles F. Carusi, and John Ridout, Esqrs., counsel for the defendants, H. Maurice Talbott, Frank I. Wood and The First National Bank of Gaithersburg. Jesse E. Potbury, Esq., counsel for the intervening petitioner, Fred. Drew.

Whereupon FRANK I. WOOD, a witness of competent age, called for and on behalf of the complainants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. CARUSI:

Q. What is your name? A. Frank I. Wood.

128 Q. Are you the Frank I. Wood named as a party in this cause? A. Yes, sir.

Q. State as fully as possible—what your connection is with the property in controversy? A. I own the ground upon which the Victoria flats are built, and also the ground adjacent thereto on the south and west, to the extent of ten feet in width. I own an undivided one-half interest therein to the extent of ten feet in width, and also a one-half interest in the flats property.

Q. Mr. Wood, when did you acquire your undivided one-half interest in the Victoria Flats property? A. I acquired it by deed, which deed is dated March 31st, 1898.

Q. Did you give value for that property? A. Yes sir, I did.

Mr. DARLINGTON: I object to that question. I submit that the facts should be stated, and not the conclusions of the witness.

By Mr. CARUSI: What was the consideration which you gave for that property? A. The consideration was my equity in all of lot "G," I think that is the description of the lot, and part of lot "F," in square 226, being numbers 1404 and 1406 Pennsylvania avenue, northwest.

Q. Do you know Mr. John C. Heald, one of the defendants
129 to this cause? A. Yes, sir, I know him.

Q. Did you ever have an interview with Mr. Heald in relation to this property? A. Yes, sir; I have had.

Q. Did you go to see Mr. Heald? A. Yes, sir, I did.

Q. What was the purpose of your visit to Mr. Heald?

Mr. DARLINGTON: I object to this question, and to any conversations between the witness and Mr. John C. Heald when the complainants were not present, said conversations not being evidence against them.

A. Why, I went to see Mr. Heald with reference to seeing whether he would make a reduction in his claim, or rather, to obtain his co-operation in getting the interest charges on the first and second trusts on the Victoria Apartment House property reduced.

Q. Did Mr. Heald agree to this? A. Mr. Heald said that he would do everything in his power to aid us.

Mr. DARLINGTON: It is agreed and understood that the objection which I made a moment ago will apply to these questions without being repeated.

(By Mr. CARUSI:)

Q. Why did you see Mr. Heald? A. Mr. Heald was largely interested in the property to the extent of many thousand dollars, and he was also a trustee under the second trust.

Q. When you say he was largely interested, do you mean that he was personally interested, or as trustee? A. Well, he was personally interested, and controlled a considerable amount secured by that second deed of trust.

130 Q. What was the result of your interview with Mr. Heald?

A. Mr. Heald said that he would do everything he could to aid us. He said he would scale his claim down. Our idea was to get a new loan.

Q. What did Mr. Heald state to you when you had this conversation with him? A. He said that he would do everything he could; that he would scale his claim down 15% and on loans he controlled he would make a reduction of 10 per cent.

Q. Why did you want Mr. Heald to scale the loan down? A. Because we wanted to get a loan of $100,000.00 at 5 per cent. With this money we wanted to pay off the 1st trust of $75,000, and the remainder we wanted to pay on the second trust, and pay it off, provided the holders of the second trust would accept that amount in cash.

Q. Would that $23,000 or $25,000 be enough money to pay off

the second trust? A. No, sir; we were assured by Mr. Nicholas T. Haller that these parties who held the second trust would accept 50% on the dollar for their claims; but, if they would not accept that much for their claims, we would give them a second trust for the difference of their claims at a lower rate.

Q. Did you go to see any of the other holders of the 2nd trust notes except Mr. Heald? A. Well, I procured from Mr. John C. Heald a list of the holders of the second trust. I think that, Mr. Talbott, and myself, met by agreement a few days later and we started out with the intention of seeing at least the larger
131 holders of the notes—the second trust notes. I think we first went to see Mr. Haller, and while there the other trustee, the co-trustee, Mr. Grayson, came in.

Q. Did you have any conversation with Mr. Grayson at that time? A. Mr. Haller introduced us and then Mr. Talbott then attempted to explain to Mr. Grayson that we were trying to get a loan of $100,000.00, and what we intended to do with it, as I stated before. Mr. Grayson would not let him explain it to him for quite a little while, or at least he affected not to understand him. Mr. Talbott finally told him that we wanted to scale down his notes. I remember that Mr. Talbott told him that if he would not let him explain it to him, we would have to drop the thing. After we finally succeeded in getting Mr. Grayson to listen to us, Mr. Talbott asked him how much he would scale his claim. My recollection is that he said that he would scale it to fifty five hundred dollars, provided he gave him his check then and there for it. Mr. Talbott told him that he could not give him a check then, but that it was conditioned upon our getting the loan of $100,000. Then he said that he would take $5,000 for it provided Mr. Talbott would give him the money then, or a check for it; and Mr. Talbott asked him if he would allow him ten days, and whether he would put it in writing. Mr. Grayson said that he would not give it in writing. Mr. Grayson said that he would not give us twenty four hours. He was rather discourteous, and said that when we got the money together we could see him.

Q. Then, how did Mr. Grayson receive the suggestion of yourself and Mr. Talbott?

132 Mr. DARLINGTON: I object to the question, as it calls for the witness' impressions or opinions.

Mr. CARUSI (to the examiner): You can strike the question out and put it in another manner.

Q. What was his manner?

Mr. DARLINGTON: I make the same objection.

A. His manner was extremely rude and discourteous to us.

Q. Did you see any of the other holders of the second trust after this interview with Mr. Grayson? A. Yes, sir.

Q. What other holders did you see? A. After that we went to see Mr. Charles A. Muddiman—I think his name is Charles A Muddiman—I know his name is Muddiman. He held some of the notes, and we met him, I think, just outside of his place of business.

Mr. DARLINGTON: I object to any conversations had with Mr. Muddiman, as he is not a party to this suit.

The WITNESS: I think he is one of your clients, and one of the petitioners in this cause.

Mr. CARUSI: He is one of the parties to this cause.

Mr. DARLINGTON: I withdraw my objection.

Q. What did Mr. Muddiman say to you? A. Mr. Muddiman told us, after we explained the situation to him, that he would scale his claim down 10 per cent., and if that was not sufficient he would make a little more of a reduction.

Q. Whom did you next see, if you saw any other second trust holders? A. We went to see Mr. Galloway.

133 Q. Is he a party to this suit? A. Yes, sir; he is the electrician; we went to see him several times, and could not get to see him; and we then went to see the firm of Landon & Merriam, and we did not succeed in seeing them. We then went to see Mr. Zellers out on 14th street; we did not see him but found his partner and stated our mission to him. He stated that he could not do anything with reference to the matter, as Mr. Zellers transacted all that business.

Q. Who did you see next? A. I saw Mr. McClure that night at his residence. Do you desire me to tell what occurred there?

Q. Yes—tell us what occurred? A. I saw Mr. McClure at his place, and told him what Mr. Heald had done, and also told him of our efforts to get the loan fixed up, and told him what we would do, and I also explained to him regarding my interview with Mr. Grayson; and I asked him what he would be willing to scale his claim to. He told me that he would take 75 % in cash, and the balance 25 % of his claim in a second trust.

Q. Did you, on that occasion, tell Mr. McClure that you would see that Mr. Grayson received nothing on his claim? A. No I did not make use of that language—how could I?

Q. What language did you make use of in that connection? A. Why, I did not have power to do that. I told him that in that interview that Mr. Grayson had been rather rude to us, and I said I would not attempt to assist him in getting his money out if

134 he was not willing to help adjust the matter at all.

Q. Why did you single out Mr. Grayson in that connection and speak about him? A. Because he was the only one who treated us at all rude and discourteous.

Q. Did you see any of the other second trust holders? A. Not at that time—Mr. Zellers called to see me several days later in regard to the matter.

Q. Well, did you ever make the loan? A. No, sir; we did not succeed. We could not get through with a loan of $100,000.00, and had to drop it.

Q. Why did you have to drop it? A. Why, we could not get them all together, and Mr. Grayson wanted his money down, and he seemed to be the stumbling block in the way; and he did not seem to want to aid us in an amicable adjustment of the matter.

Mr. DARLINGTON: I object to the witness' opinion.

Q. You dropped the matter of the loan? A. Yes, sir.

The WITNESS: I wish to make a correction in my testimony in regard to procuring that loan—I should have stated that I was to give 4 % or 4½ % for the $100,000 loan.

Q. What made you think that you could get along with $100,000 first mortgage, bearing interest at 4 % or 4½ per cent. to be secured on that property? A. Why, we had an application for the money pending and we were assured that we could get that much.

135 Q. Assured by whom? A. We had it in the Fidelity Loan and Trust Company of Philadelphia, through Messrs. Dudly & Michner, and General Michner assured us that he was reasonably sure of getting it.

Q. Was it after this that you gave up any effort to make the loan? A. —.

The WITNESS: After this application had been put into this trust company?

Q. When could you get them to agree? A. Well, I made some effort from time to time, a little effort, but never to succeed in doing anything. Virtually I gave it up at that time.

Q. Did you, after this, try to purchase from Mr. George C. Esher, the second trust notes he held against the plats property, at a discount? A. No, sir; I never exchanged a word with Mr. Esher in my lifetime.

Q. Did you send Mr. Bernard A. Duke, or anybody else, to try to purchase Mr. Esher's notes at a heavy discount? A. No sir; I never in my life attempted to purchase any notes, directly or indirectly, from Mr. Esher.

Q. (Question repeated.) Did you ever send Mr. Bernard A. Duke, or anybody else, to try to purchase Mr. Esher's notes at a heavy discount? A. No sir, I never sent anybody to him, and never made any attempt, either directly or indirectly, to purchase Mr. Esher's notes?

136 Q. What interest, if any, did Mr. Bernard A. Duke have in the Victoria Flats property? A. Why, he was simply a trustee for Mr. H. Maurice Talbott and I.

Mr. TALBOTT (interposing): Mr. Wood, I would like to call your attention to the fact that you have not answered that question.

(By Mr. CARUSI:)

Q. What interest, if any, did Mr. Duke have in the Victoria Flats property? A. Mr. Bernard A. Duke, had no interest in the property at all; he is simply acting as the trustee for Mr. H. Maurice Talbott and myself.

Q. Did you ever file a bill against Bernard A. Duke, for the Victoria Flats property? A. Yes, sir, I filed two bills.

Q. What was the nature of these bills? A. My recollection is that there were two bills filed—one an action in ejectment, and the other one an equity bill.

Q. Why did you make Mr. Duke a defendant if he had no interest in the property? A. Because our attorney said that he had the title, and that he was the proper one to file the suit against.

Mr. DARLINGTON: I object to any testimony as to conversations between the witness and his attorney, as his attorney is not a party title, to this suit.

Q. Were these suits filed before or after the property had been advertised for sale under the first deed of trust for $75,000.00 by Warner and Wine? A. They were filed just a day or two before the sale.

137 Q. But after the advertisement had appeared? A. Yes, sir.

Q. What was the object then in filing these suits? You say they were filed after the property had been advertised for sale. What was the object then in filing these suits after the property had been advertised for sale? A. My object was to give notice to the intended purchasers that the Victoria Flats property only covered 120 feet on 14th street by 124 feet on Welling place.

Q. Why did you go to the trouble of filing the suit? A. To give notice to third persons that the flats property only covered the land described in the first trust.

Q. What was the necessity of that? What was the necessity of taking this means to notify them, or why should such notice be given? A. Why, Mr. Grayson said that he intended to claim an easement over 10 feet, and virtually a contention had already arisen in regard to the matter, and we thought it best to give public notice of where we stood.

Q. How did the property come to be advertised for sale under the first trust? A. Why, default had occurred in the payment of the interest under the first trust of $75,000 to Warner & Wine, secured on the flats property.

Q. How did that come about? A. It came about because there was not sufficient money to pay the installment of interest.

Q. Did you ever have an interview with Mr. Grayson, or see Mr. Grayson, about the Victoria flats since then? A. Yes, sir,

138 several of them since then.

Q. Did you ever have an interview with Mr. Grayson at the Victoria flats, prior to, or shortly before, the property was to be sold under the first trust? A. Yes, sir. Mr. Grayson had made a formal demand in writing for the payment to him of the funds in my hands. Then he followed that up, by another demand in writing for the funds in my hand, and I told him that I would give him an answer at a certain time—that he could come up to the Victoria flats and I would be there at a certain time after I came back, as I was going out of the city for a couple of days. He came up on the time appointed, and I told him that by advice of my attorney, that I declined to pay him the money I had in my hands, and there were some words exchanged and as he was going out Mr. Talbott came in, and then he came back on seeing Mr. Talbott come

in, and Mr. Talbott, Grayson and myself, entered into a general conversation in regard to the matter. I told Mr. Talbott that demand had been made upon me by Mr. Grayson, and that I declined to turn the money over to Mr. Grayson on advice of my attorney.

Q. At this interview, did Mr. Grayson insist upon having you turn over the funds in your hands?

Mr. DARLINGTON: That question is objected to because it is leading.

Q. Was there any demand made upon you that you should turn over such funds as you might have had on hand by any person? A. Yes, sir. At first he made an absolute demand for the money that I had on hand from the Victoria flats.

139 Mr. DARLINGTON: Was this demand in writing?

The WITNESS: Yes, sir.

Mr. DARLINGTON: I object to any testimony regarding that demand unless the writing is produced.

The WITNESS: There are two of them, Mr. Darlington, in the case. There are two demands in there in writing addressed to me. If you will get them out I will identify them. I refer to Exhibits — and —. There are two papers—one an absolute demand on me for the payment of the money, coupled with the statement that he would pay the difference. These two papers are filed as exhibits in the case.

Q. What answer did you make to this formal demand—did you tell him that you would not turn over the funds in your hands? A. I told Mr. Grayson that by advice of counsel, or my attorney, Mr. Ridout, that I would not pay the money over to him.

Q. Did Mr. Grayson state to you at that interview the reason why he wanted you to turn over to him the amount of money in your hands? A. Well, he stated that——

Q. Did he tell what he was going to do with the money? A. No, I could not say he did that. He did not. We all entered into a general conversation in regard to the matter. Mr. Talbott said that he was sorry that any one should lose in the matter. He said, "Mr. Grayson, if we would turn over this money to you, what would you do with it?" if Mr. Warner refused to accept it?"

140 Q. What did Mr. Grayson say to that question? A. He declined to state what he would do with it.

Q. Mr. Wood, what connection, if any, had you with the deed of trust made by Nicholas T. Haller to Holt & Sebring mentioned in the bill filed in this case? A. I had no connection with that deed of trust whatever—only to insist upon a release of it; that is all, sir.

Q. Did you advise Mr. Nicholas T. Haller to make that deed of trust? A. No sir; I did not, and I don't think I was acquainted with Mr. Nicholas T. Haller at that time. Certainly I had no business connection with him at all.

Cross-examination.

By Mr. DARLINGTON:

Q. Where is this Holt & Sebring deed of trust, Mr. Wood?

The WITNESS: The deed of trust?

Q. Yes, sir—where is that deed of trust? A. I have it in my possession.

Q. Where is the release of it? A. I have that in my possession.

Q. Will you kindly produce those two papers at our next session? A. I will do so.

Q. You stated to Mr. Grayson, you say, at the time he called on you and made demand for the money to pay the interest—that you declined to pay the money over to him by advice of counsel? A. Yes, sir.

141 Q. Did you give him any other reason? A. Why, I had submitted that matter to Mr. Ridout.

Q. Did you give Mr. Grayson any other reason for not turning the money over to him except that you declined to do so by advice of counsel? A. I think that is the only reason I gave—that is my recollection of it.

Q. What time elapsed between this first call and this second interview when you had the benefit of counsel? A. I think about ten days, or two weeks, but I won't say positively about that.

Q. Did you see B. H. Warner & Company between those interviews? A. Well I would like to say right here that Mr. Grayson asked me at one of these interviews whether I had made any effort to get Mr. Warner to extend that loan.

Q. I asked you whether between these two visits of Mr. Grayson, about which you have testified, if you saw Mr. Warner, or B. H. Warner & Company with reference to the Victoria flats, or any phase of it? A. I had been in there quite a number of times.

Q. My question is, Mr. Wood—whether you had any interview with B. H. Warner & Company between those two visits of Mr. Grayson? A. I don't think I did.

Q. Will you think a moment and tell us whether you can recollect that you did? A. I think I asked Mr. Rheem not to put a sign up in front of the door—that is all I recollect of having any interviews.

142 Q. What reason had you to suppose that Mr. B. H. Warner & Company would refuse the interest in default if tendered to them? A. I knew that default was made. I had no reason.

Q. My question is—what reason did you have that B. H. Warner & Company would not accept the interest in default to them? A. I say I did not know of any reason.

Q. What effort did you make to ascertain whether they would accept the interest in default on that first trust? A. I never asked them.

Q. You did not endeavor to prevent a sale of the Victoria Flats property in any way? A. I did not.

Q. You did not try in any way to prevent a sale of the Victoria Flats property? A. I did not.

Q. You say you brought a suit in ejectment against Mr. Bernard A. Duke? A. My recollection is that there were two suits, one in ejectment and one in equity.

Q. Was Mr. Duke resisting you or your claims in any way? A. No, sir, he was the record owner.

Q. Was he claiming any interest adversely to you? A. No, sir.

Q. Was he in possession of the property? A. No, sir.

143 Q. Had he ever been? A. No, sir.

Q. Do I understand you to say, Mr. Wood, that you never communicated in any way with Mr. Esher upon any subject whatever at any time? A. I never exchanged a word with Mr. Esher on any subject, nor communicated with him in any way.

Q. You state that? A. I did not communicate with him about any matter in any way; I would like to make it as strong as I can make it.

Q. Do you know any facts or circumstances of a man going to Mr. Esher, and pretending to be Mr. Wood, and trying to buy his notes? A. No, the only reason that I could assign for any person going there would be to buy them. If they went to him they were not authorized to go by me. So far as it relates to me, it was wholly unauthorized.

Q. Did you talk with Mr. Bernard A. Duke about your desire to buy these notes? A. No, sir.

Q. Never did? A. No, sir.

Q. So far as you know he never tried to buy these notes for you? A. He knew that we were trying to scale these notes or he knew what we proposed to do. He was well aware of that because he was in Mr. Haller's office when we had the interview.

Q. Was Mr. Duke at these interviews? A. He was down to the office with Mr. Nicholas T. Haller.

144 Q. Where was that? A. I think that was in the Ohio national bank, or Western Union—I don't know which one.

Q. Can you recollect the building? A. It was in the Ohio Bank building.

Q. Was Mr. Duke present at Mr. Haller's office with Mr. Talbott and yourself? A. He was simply there when we went in—I don't know why he was present. As far as I know he transacted a good deal of business for Mr. Haller, and he happened to be present.

Q. Upon what other occasion was he present when you were discussing the scaling of these notes? A. I don't think on any other occasion. I have no recollection of his being present on any other date, excepting he went to Mr. McClure's that evening.

Q. What did he do that for? A. He told me where I could find Mr. McClure, and he went with me.

Q. Where was Mr. McClure's house? A. I think somewhere in the neighborhood of 26th street—somewhere near a hospital, I think, on 26th street.

Q. Where did you meet with Mr. Duke? A. I think at his house.

Q. Where was that? A. To the best of my recollection he was on New York avenue, near 10th street; I am not certain.

Q. He was not in Anacostia? A. No, sir, I would remember if he was; he was not in Georgetown either. He kindly offered
145 to go to the place and I went with him.

Q. He had no interest in the matter at all? A. No, sir.

Q. Never had any interest in the matter? A. No, sir.

Q. He seemed to be trustee and defendant in all of these things for some reason? A. I don't know any more than what I have told you about that. He was simply trustee; it was at Mr. Haller's suggestion that the property was put in him as trustee. He had owned other property, and had held title to other property as trustee for Mr. Haller and others.

Q. How long had you known Mr. Duke? A. For a number of years.

Q. What did you know of his circumstances? A. I knew nothing of his circumstances.

Q. What did you know of his condition as to liability as to suits and judgments? A. I didn't know that there were any suits against him.

Q. What inquiries did you make to find out before putting the title of valuable property in his name? A. I made no inquiries.

Q. How can you explain that—how do you explain your conduct in putting title in a man whose circumstances you knew nothing of? A. I don't know that I made any inquiries at all—I never heard of any judgments against him—he seemed to be an honorable man.

Q. What was his business? A. To the best of my knowl-
146 edge he was employed by a real estate firm for a long time.

Q. By what real estate, firm, and when? A. By Mr. C. A. McEuen for a number of years.

Q. How many years before this transaction? A. Well, I should say three years before—anyway two or three years.

Q. After that employment ceased, what did he do? A. I think he did a general collection business, and I suppose he made sales of real estate when he could.

Q. Do you know of any sales of real estate he made at the time of this Victoria Flats transaction? A. I don't know, except I have a general knowledge that he was engaged in it.

Q. Why did you want him as a trustee? A. Simply because Mr. Haller desired it to go that way.

Q. You did not want him? A. No, I cannot say that I did.

Q. What was the trust, and how was it evidenced? A. It was simply a deed that was absolute on its face, but Mr. Duke gave Mr. Haller a receipt setting forth the fact that he had received this deed and held it in trust for Mr. Haller and myself.

Q. Where is that receipt? A. I have it in my possession.

Q. Kindly produce it at the next session? A. I will.

Q. When was it that you saw Mr. Heald about getting the rate of interest reduced? A. Why, we saw Mr. Grayson when we started out.

Q. When did you next see Mr. Heald in connection with
147 this matter? A. Well, I saw him with reference to getting the notes scaled down—in relation to making the application.

Q. This is the time he gave you the list of the second trust note holders? A. Yes, sir.

Q. After he gave you this list of second trust holders when did you next see him? about the Victoria flats? A. I think the next time I saw him was in his office.

Q. What about? A. Why, we told him of the result—that we had been unable to get these parties.

Q. That you could not take this loan? A. Yes, sir, could not get these parties to scale down their interests.

Q. Is that all you told him? A. I told him of the result of my efforts.

Q. Is that all you told him? A. All I can remember at this time.

Q. I wish you would think and tell us whether that is the whole—what you tell me is the whole of what you told Mr. Heald?

Mr. TALBOTT: That is hardly a fair question, unless you lay the foundation to contradict the witness.

A. To the best of my recollection that is all. That is about all I said to him.

Q. Now, when did you next see Mr. Heald about that, or in connection with the Victoria flats? A. I have no recollection of seeing him in reference to that.

Q. At any time? A. I think that is all I saw him with
148 reference to that.

Q. So that the only interviews you had with Mr. Heald with reference to the Victoria flats was: First, to see if the rate of interest could not be reduced on the mortgages and, second, to get a list of the second trust holders. Third, to state to him that you had failed to get them to agree to scale their interests? A. These are all the conversations I had in connection with it.

Q. Was not the first trust on 1404 and 1405 Pennsylvania avenue, $13000.00 when you conveyed it to Mr. Haller? A. The first trust was for $13,000.00 straight loan when I conveyed it.

Q. On each house? A. On the two houses.

Q. What other trusts were on those houses? A. Why, I gave a second trust for $7,000.

Q. So that, all you gave then for your interest in this entire property was the equity in these two houses subject to $21,000.00 trust. A. I gave him the property subject to $20,000 encumbrance.

Q. Are you aware that those two pieces of property were sold under the encumbrances and did not bring them? A. I know that property was sold under the second trust.

Q. And it didn't bring them? A. Yes, sir; it did.

Q. Did it bring any surplus? A. Yes, sir, it brought enough to clear it.

149 Q. Who made that sale? A. Well, now I cannot recall who made the sale.

Q. Who made the sale of houses 1404 and 1406 Pennsylvania avenue? A. I think Mr. Pitt, am, and Mr. Duke, who were the trustees, and I would not be certain as to that.

Q. Is your recollection clear as to whether there was a surplus to go to Mr. Haller? A. I say it cleared the first trust, and the second trust, and the expenses.

Q. So that Mr. Haller did not get anything for the property? A. Under the sale?

Q. Yes. A. I don't know; I am sure he got my equity in them, as far as I was concerned.

Q. An equity which was proved to be worth nothing? A. Yes, sir, the equity was worth something.

Q. If the equity was worth something, how do you account for the fact that there was no surplus? A. Valuable property sells at auction often and does not bring its full value.

Q. That was a speculative value which could not be realized. A. No, I do not think it was a speculative value at all—it was an actual value.

Q. How do you fix an actual value to this property as distinguished from the fact, that it only realized enough to pay the trusts and expenses? A. What it would sell for at private sale, and what the adjoining properties were held at—that is the way I fix it—I also fix it by the value put on the property.

150 Mr. DARLINGTON: I will resume my cross-examination of this witness at the next session.

Thereupon, H. MAURICE TALBOTT, one of the defendants, a witness of competent age, called on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. CARUSI:

Q. What is your full name? A. H. Maurice Talbott.

Q. Are you the H. Maurice Talbott named as one of the defendants in this case? A. I am.

Q. State your connection Mr. Talbott, with the Victoria flats? When that property was acquired, and what you acquired? A. I am the legal owner of one-half undivided interest in it, subject to the trust that is on it. I am the legal owner of an undivided one-half interest in it subject to the trusts that are on it; there are two trusts.

Q. How did you acquire it? A. I bought it from Mr. Nicholas T. Haller; I had known Mr. Wood, and Mr. Duke, for quite a number of years, and had considerable dealings with Mr. Wood. Mr. Wood, sometime in the latter part of 1898, or the early part of 1899, talked with me considerably about his interest in the Victoria
151 hotel, and tried to induce me to become interested in it, either by buying Mr. Haller out, or buying a portion of the interest of Mr. Haller. The matter went on between Mr. Wood and myself for some months before I had a talk with Mr. Haller. Then, I had several conversations with Mr. Haller and Mr. Duke, or negotiations rather, between Mr. Duke and myself for Mr. Haller; Mr. Duke

seemed to be connected with Mr. Haller in some way, and made Mr. Haller's office his headquarters. It finally resulted in my getting an option on the other undivided half interest, which option, I now file with the examiner, and ask that it be marked H. M. T. No. 1.

NOTE.—Paper referred to by the witness put in evidence, and marked H. M. T. No. 1.

(Witness continuing:) The date of this is the 29th day of March, 1901.

(By Mr. CARUSI:)

Q. Is that option on the Victoria flats proper? A. This option was on lots 1 and 2 of Hill's subdivision of Mount Pleasant.

(Witness continuing:) This resulted in my purchasing the property on the 1st day of April, 1899, as will be seen by Exhibit H. M. T. No. 2. I paid Mr. Nicholas T. Haller $3100—one thousand dollars of which I paid in cash, a short note for $500, and two notes of $800.00 each. Mr. Haller informed me when these two notes for $800 each were given, that quite a good deal of money had been borrowed by him from some relative of his, and that he wanted these notes to pay her back, the money—that she had already part of the money that she had given him, and which he had
152 used in the construction of the Victoria flats, and that the notes would suit him as well as the cash for this lady would want to have it invested anyhow.

Q. Were those notes paid? A. I have the notes in my possession now. Now more than a week or ten days afterwards I met Mr. J. Sprigg Poole, who informed me that he had purchased of Mr. Haller both of the notes. I offer the notes in evidence and ask that they be marked.

NOTE.—Notes referred to by the witness offered in evidence and marked Exhibits H. M. T. Nos. 3 and 4.

My purchase was based largely upon the information that I had derived, and the value of the land surrounding the Victoria hotel, from B. H. Warner, and several other real estate men of Washington city, who valued this land at from $1.50 to $2.50 per foot. Shortly after this, Mr. Wood made the demand upon B. H. Warner & Company.

Mr. DARLINGTON: How do you know that?

The WITNESS: I was there and heard it, sir.

Witness continuing: Mr. Wood made demand upon Warner & Company for possession of the property which was at once given, and Mr. Wood began then to run the Victoria hotel himself. It was not very long after that before I discovered, or had reason to believe, that the rosy views entertained by Mr. Wood as to the value of the hotel property would not be realized, unless we could very materially scale down the expenses of the building. Then the suggestion was made that we procure a loan at a less rate of interest per cent. than 6%, that being the amount
153 of interest of both of the trusts on it. Being well acquainted with Mr. Warner and Mr. Wine I went to see them for the

purpose of finding out from them whether or not the loan which was not then due could be taken up. I did not see Mr. Warner, but had an interview with Mr. Wine. He informed me that they controlled a good many of those notes, and that he had no doubt that that could be done, and he advised me to go ahead and get my loan up. Mr. Wood was not present at that time, but suggested that a Mr. Williard owned $5,000 worth of that paper, and that we might have to pay Mr. Williard a little bonus to get those notes. We then made application to Mr. Lampton who assured us that he could procure for us a loan of $100,000. While the negotiation was going on about this loan, we did nothing with the second trust holders. Then we applied to Dudley & Michner, and Mr. Michner assured us that he could secure the loan of $100,000 for us. We then went to see Mr. John C. Heald, with whom I was well acquainted, at that time having several matters of business with him, to see what could be done in the way of fitting a $100,000 loan into the $116,000 worth of indebtedness. Mr. Heald met us very cordially and said that he represented about $10,000 worth of the loans, and owned, I think, nearly $3,000 worth in it himself; that he would scale his interest 10%, and possibly more, and that if we would push the matter through, and did not have money enough to go through with it, he would see that his parties took second trust notes for the amount that the loan lacked. All during the negotiations with Mr. Haller he was constantly telling me, or rather at every interview he would tell me,
154 that the second trust men would sell their notes at a large discount, the exact amount of discount I don't recall, but it left the impression upon my mind that they would be willing to take on an average of 50% for their notes. So that, when we got Mr. Heald in position where he could aid us, Mr. Heald also said in our conversations with him, that he either represented some Baltimore second trust creditors, or could get them to do as he was doing. Now, after we had arranged this matter with Mr. Heald, Mr. Wood and myself started to Mr. Haller's office to get him to either go with us to see these second trust men or put us on their track. We found Mr. Duke in the office when we got there. We told Mr. Haller our business, and reminded him of his assertions that these notes could be bought or scaled down, told him that we thought we had succeeded in getting a loan of *of* $100,000, and while we were talking with Mr. Haller, Mr. Grayson walked in. Mr. Haller at once introduced us to Mr. Grayson, and I started the conversation by stating to him that we were trying to adjust the loans on the Victoria on a better basis, and that we thought we had a $100,000 loan which would leave us $98,000 cash of available money. Mr. Grayson, without any reason, immediately began to talk in a discourteous and loud manner, indicating by his talk that he did not believe what I was stating, by demanding. "Yes," he said, "I will take $5500.00 for my claim if you will sit right down and write the check. I told Mr. Grayson that he certainly failed to understand what we were trying to do. I said, "I have not $5500 for which I can give you a check, and unless you appreciate the fact and believe what we are

telling you that this whole matter depends upon our
155 procuring this loan, we will not be able to get this deal through." His answer and all the balance of his talk from that time until he left Mr. Haller's office was discourteous and ungentlemanly. He left, and as he was leaving said: when we get ready to give him $5,000, he would be willing to talk to us. I said that unless we could have that in writing, and time enough to adjust the matter, that his proposition was foolish; that we did not intend to put ourselves in the attitude of being compelled to pay $2,000. for a loan secured for us, and then not be able to take the loan, and that he ought to have judgment enough to know it, or words to that effect. Mr. Wood and Mr. Haller, and myself, at Mr. Haller's suggestion then went to a Mr. Muddiman, who met us courteously; said that he would take 10 % off of his bill; and remarked that if it was necessary he would take more off; and after a pleasing talk we left him, and then went down on 10th street to see somebody else. We did not find the 10th Street man at his place, and then we went up on 14th street to see some parties, and did not find them at home. We then came back to the 10th Street man, and did not find him. That was all the connection I had with the attempted scaling of these notes to fill the $100,000. loan which I wanted to get. I never attempted to buy any of these notes either directly or indirectly at any price, and no attempt was made by me to either buy Mr. Grayson's note nor anybody else's note. An attempt was made to fix this loan with the profits, to get their money out of the building, which, had Mr. Grayson, met us courteously and acceded to any reasonable proposition.

Mr. DARLINGTON: I object to the hypothetical part of that
156 answer and move to strike it out.

Mr. CARUSI: That is not proper and should go out.

Witness continuing: I became disgusted with the attempt to borrow the money, and Mr. Wood continued to run the hotel up to the time when it was demonstrated by the failure of collecting sufficient funds from the hotel to pay the interest on the first trust. Then relying upon the valuation placed upon the ground surrounding the hotel, to get my money out of it, I would not put in any more money. I called at the Victoria hotel one evening, not by appointment with Mr. Grayson, but found him there just leaving as I went in. Mr. Wood informed me that the demand had been made on him for *for* the amount of money in his hands by Mr. Grayson for the purpose of either paying the interest, or paying it as far as it would go. Mr. Grayson went back into the office of the hotel, and we had a talk lasting for perhaps half an hour, and possibly more.

This time the talk was a pleasant one; it began by Mr. Wood telling me that he had consulted with Mr. Ridout as to the payment of the money he had in his hands, and that Mr. Ridout had advised him not to turn this money over which led to the remark by me to Mr. Grayson that the trust, I had no doubt, provided in the default

of the payment of the interest, the whole amount secured by
157 the trust became due, and that he had demanded the money Wood had with which to pay the interest to Mr. Warner. I then asked Mr. Grayson in the event that Mr. Warner declined to receive the interest, what would he do with the money? He declined to answer this, although I repeated the question twice, if not three times. I then said to him, "Mr. Grayson if you decline to answer that question, I think the money is just as safe in Mr. Wood's hands as it is in your hands. Then, a general conversation resulted about the building, and then in that conversation he explained how the building came to be located without any of the surrounding land being owned by the building itself. And said that Mr. Haller was a fool for building it that way. I said to him, "Yes, that was not only foolish, but unfortunate." I told him that Mr. Wood had his money in there, and I had mine, and that quite a number of laboring men and mechanics and contractors had their money in there, and that all we wanted, Mr. Wood and myself was to get our money out of it, and that it did not look to me like the property would bring enough to bring us out of it, but that, as far as I was concerned, I thought the land surrounding the building which had a $12,000. trust on it, was sufficiently valuable to bring us out; or if, it did not that was all we could look to to bring us out. Mr. Grayson then asked us, then following this question as to what we had in it, or the amount of money Mr. Wood and I had in it. Mr. Grayson then asked us either what we would take for the land, or what the land was worth, and my answer to that was, having in
mind the amount of money that Mr. Wood represented he
158 had in it, and what I knew I had in it, was that it would be high priced land, or words to that effect. Shortly after this Mr. Grayson left and that ended that part of the conversation.

Q. Did you see Mr. Warner prior to, or after, the default had been made in interest on the first trust, and ask him not to sell the property? A. No, I did not.

Q. Had you at that time, or had Mr. Wood, in his possession sufficient funds to pay the interest then due for interest on the first trust, if Mr. Warner would have accepted it? A. I can only say that I did not have any of the funds. Mr. Wood had the money, and I think he did not have enough. I think he had $1200. or $1400., and the interest was, I think $2200.

Q. What connection, if any Mr. Talbott, did you have, with the so-called Holt and Sebring trust? A. I had no connection with it, except I was informed by Mr. Wood in the early part of the negotiations, that there was such a trust there, and I took this Exhibit No. 2, and demanded that this trust be released, and Mr. Wood informed me that it had been released. This was in Mr. Haller's presence, and Mr. Haller added to that that it was only put there as a blind. My answer to that was that I did not care what kind of a blind it was—that I wanted it released, and I think that Mr. Wood answered that it had already been released, but I knew nothing of the transaction. I was not acquainted with Mr. Haller at the time

it was drawn. My first connection with this whole matter
159 was caused by Mr. Wood telling me that the holders of two of the notes secured by the trust on the land surrounding the building wanted their money, and that he and Mr. Haller were unable to pay, and asked me if I could arrange in any way to take those notes up. My firm handles considerable money, and at that time the bank with which I am connected wanted discounts, and I presented the matter to the board of directors, and they stated that if I would get statements from three or four reputable real estate men as to the value of the land surrounding the Victoria Hotel property, the Victoria Hotel building, and put up an abstract of the property, that it could be gotten by Mr. Haller and Mr. Wood making a note and putting the two notes up as collateral security. Mr. Wood, or Mr. Haller, I don't know which, sent up possibly half a dozen letters of real estate men in Washington, and an abstract of the property which was submitted to me. On the certificates as to the valuation, and on the abstract, the First National Bank of Gaithersburg, loaned Mr. Haller and Mr. Wood, $4,000. with these two thousand dollar notes as collateral, and two of the notes secured by the notes of the Holt and Sebring trust. I don't know why those notes were put up, because I placed no value on them, and told the board of directors, that they, in my opinion, were of no value, but the suggestion was made by Mr. Haller, I think, and acceded to by me, and this was how I knew that there was a third trust on the building.

Q. Was there ever any agreement that you know of between the trustees, McReynolds & Merriwether, the trustees under the
160 trust on all of lots 1 and 2, except that portion covered by the flats property, to release any portion of the ground around the flats property? A During the progress of the negotiations with Mr. Haller just before I bought some one said something about a release of a portion of that ground. I asked Mr. Haller about it, and he said that was not true, but that Mr. McReynolds knew all about it, and I could satisfy myself about it by going to see him. I called to see Mr. McReynolds, and he said there was no such agreement; that Mr. Haller had submitted sometime before that a proposition to have a release of ten feet around the building, and that he had agreed that if they would pay him a certain amount of money, the amount I have forgotten, he would see if he could get the ten feet released; that nothing had been done by Mr. Haller toward getting the ten feet release, and that the time had expired for the payment of the money for the ground, and that as far as the ten foot, or any other amount of land, there was no agreement about it. On that statement, and on an examination of the letters that passed between Mr. Haller and him, or the letter of Mr. McReynolds, which I showed him, I bought the property.

Q. Mr. Talbott, when you acquired your interest in the property, was a deed made to you passing you a legal title? A. No, sir; it has not been made yet.

Q. Who holds the legal title? A. I was informed by Mr. Wood—why Mr. Duke held it then. Mr. Wood now holds the title for the land

surrounding the Victoria flats, and Mr. Duke holds the title
161 to the ground upon which the Victoria flats stand. The reason that the land around the Victoria was deeded to Mr. Wood was because in the blizzard of 1899, an old gentleman who held one of these trust notes on the ground surrounding the Victoria, lost his pocket book, and among the contents was one of these notes, and he required Mr. Wood to make a duplicate note for the one that was lost covering the same ground. For that reason the title of the ten feet was put in Mr. Wood by Mr. Duke. (Witness to Mr. Carusi:) Isn't that right?

Mr. DARLINGTON: One moment, Mr. Talbott.

Mr. CARUSI: We have not answered as to whether it is right or not.

Witness continuing: I am rather inclined to believe that it was the 20 feet that was out into Mr. Wood.

Mr. CARUSI: Mr. Wood, so far as you know, holds the title in himself to all the land around the Victoria flats?

Mr. DARLINGTON: I object to the question; the witness' recollection on that point would not be evidence.

Mr. CARUSI: The deed will speak for itself.

Q. Did you make any objection to the legal title of any of the land remaining in Mr. A. B. Duke? A. Not at all; I had the abstract of title of one of your title companies bringing it almost down to date, and I made an examination myself, and continued the abstract.

Q. Did you join Mr. Wood as plaintiff in bringing suit against Bernard A. Duke?

Mr. DARLINGTON: I submit that that is a matter which can be proved only by the record.

162 Q. What was the reason for making Mr. B. A. Duke a party to the equity suit? A. Well, he was the holder of the legal title, and it became a question as to whether he should not be made a party. Mr. Grayson, in one of the conversations—Mr. Grayson, or somebody else I don't know who, spoke of—yes it was Mr. Grayson. In this conversation at the Victoria, Mr. Grayson spoke of this 10 foot space, and after expressing himself that Haller was a fool for building on ground with no ground around it; he then spoke of the 10 foot space, and afterward Mr. Wood suggested that it would be —, if that building was sold to a possible buyer, not to inform him by the record of the rights that he and I had, and suggested docketing a suit of that character. I was rather opposed to it at first, because my theory about that was that the record disclosed the condition of affairs, but I could see no real objection to it, and therefore a suit was brought.

Q. Was this suit brought before or after the property was advertised for sale? A. I don't know which—I say I don't know.

Cross-examination.

By Mr. DARLINGTON:

Q. Mr. Talbott, you are a member of the bar? A. Yes, sir.

Q. And have been for how long a time? A. I have been a member of the bar since early in the seventies—from 1872, 1873 or 1874; somewhere along in there; I have practiced since 1882.

Q. You have been actively engaged in practice since 1882?

163 A. Since 1882.

Q. Where? A. In Rockville, Marvland.

Q. I assume that you did not buy these lots without some knowledge at least of the title at the time you bought them, did you? A. I had examined the abstract when the first four thousand dollar loan was made.

Q. That was within a short period of that time?

The WITNESS: Of what time? Of the time of my purchase?

Q. Yes. A. To the time of my purchase, and I then continued the examination down to the date from the time of the abstract.

Q. The borrowing of the $4,000 was shortly before you bought your interest, was it not? A. No, it was considerably before that—it was possibly five or six months before that.

Q. At the time of your purchase, did you examine the title from the date of the abstract down to the time you purchased? A. I think I did that just before the purchase.

Q. So that, at the time of your purchase, you were advised as to the condition of the title? A. Oh, yes.

Q. How came you to be concerned with this question of the release of the 10 foot strip on the west and south of the house, or the talk about it? A. The suggestion was made either by Mr.

164 Wood, Mr. Haller, or Mr. Duke, about the ability of the holders of one of the trusts to demand a release of the 10 foot strip around the building. After satisfying myself about that I called to see Mr. McReynolds.

Q. At what time was that—before or after you purchased? A. I think it was before.

Q. Was it before, or after, the $4,000 transaction of the Gaithersburg bank? A. I think it is more than likely it was after that.

Q. It was some time between the two? A. Yes.

Q. What reasons, or grounds, did you have for the belief that the holders of one or the other of these trusts would demand the release of this strip? A. My recollection of the persons who spoke to me about that, Mr. Darlington, was so vague, that I cannot state who they were. I can only state that this question came up in some way, but I could not tell you now how it came up.

Q. Now, I wish you would refresh your recollection, if you can, and state whether it was or was not in connection with the $4,000.00 loan made with the bank? A. It was not.

Q. You made the purchase of the Victoria flats, and the ground adjacent, all at the same time? A. Yes, that is right.

Q. What difference did it make to you whether the 10 foot strip

was, or was not released, since you held or owned the whole?
165 A. It was not a question of release. In answering about it, I mean to say this—that in the event we could not realize on the Victoria Flats property and get out our money, we, according to the valuation put on the ground by B. H. Warner & Company, or B. H. Warner, and also by three or four or five other real estate men here in the city, as to the value of the ground surrounding the Victoria Flats property, I could see where I could get my money back. Or in other words, if we could not make a success of the Victoria, or make some disposition of it, either by negotiating the $100,000 loan at a less rate of interest by which the hotel would carry itself, and leave something for us, that I would still have the value for the money that I had in it in the surrounding land.

Q. This matter of $100,000 transaction was not spoken of at that time. A. No, sir; not at that time.

Q. So that could not have been the reason, could it? A. No, take it in this way: I perhaps don't explain my position—the question in my mind was whether or not the hotel could carry itself, and that if it did not, and that if we could not hold on to the hotel and had to let it go, the ground surrounding it would be sufficient for me to get my money out of it.

Q. Did you think that your position would be better by having the 10 foot strip covered by the trust? A. Well, I don't understand that question, Mr. Darlington.

166 Q. Would not your security have been better if the 10 foot strip were released? A. Certainly it would not have been better if we did not own it. I don't exactly understand your question, but if the 10 foot strip had been taken away from us we would have had just that much less land.

Q. But you were not told by anybody that the 10 foot strip had been taken away except by the lien of the McReynolds trust? A. I must be a little dumb; I cannot understand what you are driving at.

Q. If I understand your testimony in chief, you declined to make this investment until you had been assured that there had been no release of this 10 foot strip? A. No, not the release of it.

Q. What? A. The question was—whether Mr. Haller had the control or ownership of the 10 feet around the building. Now, if Mr. Haller did not have that, and these people could come in and take it——

Q. Which people? A. The people who might possibly be the owners of the Victoria flats at that time—if they could come in by taking the easement we would have that much less land.

Q. You did not buy the property, and the surrounding land at different times? A. No, sir.

Q. You bought them all at once, didn't you? A. Certainly, but I had separated in my own mind the Victoria flats from the
167 land surrounding it, and had come to the conclusion that even if we could not carry on the hotel itself, that the land surrounding it would bring enough to let me out.

Q. Would not your position have been better instead of worse if you had found that the McReynolds strip had been released from the trust since you were buying the whole thing? A. It was not a question of the release of the McReynolds trust. It was the question as to the easement over it, and the ownership, or the connection between the hotel and the surrounding property.

Q. Of course if the 10 foot strip had been released from the McReynolds trust there would have been just that much less trust on the property? A. Undoubtedly.

Q. Now, you stated in your testimony in chief, Mr. Talbott, if I understood you correctly, that before making this purchase, having heard of this Haller release, you would not have anything to do with the property until you had gone to McReynolds and he had shown you a letter and made the statement that there was no release of the 10 foot strip—am I right about that? A. It was not a question of release, but it was a question of ownership of the 10 foot strip. In other words, I wanted to see if the owners of the first trust, or the second trust, had any right to the ground surrounding the Victoria Hotel property.

Q. Any right for what purpose? A. A right to go in and demand, or claim, an easement over it.

168 Q. Easement for what purpose? A. For any purpose—either light and air, or a areaway.

Q. What need, so far as you know, had the second trust people, or any other people, for light and air? A. Well, we had understood that the building was on the line.

Q. But you knew that before you bought it? A. Well, I was told so. I didn't know it.

Q. You knew, did you not, that before the building was begun, Warner & Wine, were trustees under a trust for $75,000, and notes to that amount were outstanding, upon the security of the flat property? A. I supposed so, but I did not know it. At the time the building was begun I did not know anything about it.

Q. You also knew that the men who built the Victoria Flats property had put their labor and material into it and held the second trust on it? A. I knew of the Grayson and Heald trust.

Q. And you knew that the trust represented in a large part the money due to the material men and contractors in the construction of the Victoria flats? A. No, I didn't know that.

Q. Had you no information at all as to the consideration of the second trust notes—what they represented?

The WITNESS: At the time I bought?

Q. Yes? A. I am not sure that I did, and I am not sure that I did not.

169 Q. You knew, did you not, that both the holders of the Warner & Wine trust notes, and the owners of the Grayson and Heald notes, were dependent for their security, in a large part, in this easement for light and air to the property? A. I never knew any claim to be set up by this easement until Mr. Grayson claimed an easement at the conversation had at the Victoria flats.

Q. And yet you declined to purchase until you had seen Mr. McReynolds to see whether or not there was anything between him and Mr. Haller affecting the 10 foot strip around the building, and had been assured by McReynolds that there was not. And you told us several times that you did that because there was some question of one or the other of these trust note holders having a claim to this easement? A. I am not sure that that came from the trust owners; it may have come from Mr. Haller.

Q. Did you learn from somebody that there was a likelihood of some of these trust holders claiming that there was an easement in favor of the flats? A. No, I never heard of that excepting there was a trust on the building.

Q. Now, if you did not think that the trust note holders were the people who were claiming, or might claim, an easement, who did you think might claim an easement?

The WITNESS: How is that?

Q. If it was not the trust holders, by that term I mean the holders of the trust notes who might claim an interest, or the easement over that strip—who was it that might claim it?

170 The WITNESS: The question relates to the land surrounding the Victoria flats?

Q. Now, the value of that land would have been very materially reduced by somebody claiming an interest, or a right there? Now, who was it that you were told had, or might have, an easement over that land? A. I am not sure about that at all.

Q. I wish you would recollect? A. The ten foot question came up in some of those talks. I don't know just when it came up.

Q. It was before you bought you said? A. I think it was before I bought, and yet it might have been after I bought, because I can see how that thing could have come up afterwards very readily.

Q. You found, from your examination of the title, did you not, the 10 foot strip had been taken from the McReynolds and Meriwether tract and added to the Victoria flats by a deed from Haller to Duke—that had been done in 1898? A. In all probability when I made that examination I either knew of that fact, or took Mr. Wood's word for that part of it.

Q. You say you had an abstract? A. I had an abstract to a certain point, and then I examined it after that.

Q. Who was it that you understood either claimed, or might possibly claim, an easement in that 10 foot strip? A. Either I have made myself obscure, or I don't understand your questions. It was not the easement at first. It was some suggestion about the 10 foot strip. The land around the Victoria, of course, was more

171 valuable without an easement than it would have been with one, especially a high building towering over a low one.

Q. More valuable to whom? A. To anybody I should think.

Q. More valuable to the Victoria Flats property? A. No, to the owner.

Q. Owner of what? A. The owner of the land.

Q. How about the owner of the Victoria flats, of whom you were

then becoming one? A. I have answered that before by stating that in my mind there were two ways by which we could come out of the transaction, I thought, with our money—either make some money, or at least get our money back. One was by running the Victoria, and having the receipts exceed the expenditures, and Mr. Wood, thought that this could be better worked out by reducing the interest charges on the hotel which we attempted to do; and the other theory was that if we could not work the hotel and get out of it and get our money back or make money, that we were safe on the ground surrounding the hotel, the statement having been made by Mr. Warner and several other real estate operators, that this ground was worth from $1.50 to $2.50 a foot, and as the trust on it did not go up to more than half or ⅔ of its value, and as we were under no legal or moral obligation to pay any of the debts contracted by Mr. Haller, than which were secured by deed of trust on the Victoria Flats property, we thought that we would try the Victoria flats, and if that did not pay, or we could not make it pay, we would simply abandon that and hold on to the land surrounding it; there
172 was no attempt made by me, nor did I authorize any one on my behalf to purchase any of the second trust notes at a discount.

Mr. DARLINGTON: I must object. You are wandering very far from the question.

A. The $100,000.00 trust had it been secured, would have fixed that part of it, but as we could not make the Victoria flats pay, we abandoned that much and relied on the ground surrounding the Victoria Flats property to realize our money which we had invested.

Q. I am asking you about what occurred at the time you bought your interest, and your answer relates to what took place more than a year after that? A. Will you kindly repeat the question so that I can get on the track again?

Q. My question all along has been—who it was you were informed either had, or might have, an easement, or a claim of ownership, or some other claims upon this 10 foot strip, and which matter you investigated before you bought? I want to know who it was that had this claim, or might have had it? Not who told you, but who was the possible claimant? A. Mr. Haller, or Mr. Wood, or Mr. Duke, but I don't know which, said something about a 10 foot strip around the building—that Mr. Haller could have had it released under certain conditions. Now, all I wanted to know was whether that was true.

Q. How did that affect you? A. Why, it affected just that much less—it did not affect me.

Q. How much would that affect your interest if it were
173 true, as you then understood it? A. Well, it would affect it this way—that land fronted 30 foot on 14th street, and I was satisfied that it could be divided into two lots, whereas, a 20 foot lot could not be divided into two lots. Then, it became a question as to whether, or what, connection the 10 foot strip had with the Victoria flats.

Q. Do you mean this—you thought if they had a right to a release of the strip it might narrow the frontage south of the Victoria flats, and lessen its value? A. No, not at all—only the land surrounding the Victoria; the value of the land is large- increased by the Victoria flats being there without any easement of light and air.

Q. Was it your idea that if this 14th Street frontage of 30 feet was unaffected by the easement, you could make two lots of it, whereas, if there was this easement right you could only make one. A. That is not all of it at all. I wanted to know what, outside of the record, affected this piece of land. I wanted to know what, outside of the record, as some notice had been brought home to me of the 10 foot strip—I wanted to know all about it.

Mr. DARLINGTON: Mr. Talbott, you well knew, as a lawyer, did you not—that if Mr. Haller had this supposed right, and you bought all of Haller's interest in the Victoria flats, you received it, didn't you? A. Why yes, but he didn't have it.

Q. So you were not afraid of any interest that Haller might have about an easement? *A.* It must have been somebody else
174 that you thought might have an easement? A. I called to see Mr. McReynolds purely for the purpose of finding out what papers were in existence affecting this 10 foot strip, some notice having been brought home to me,--that there was some paper in existence affecting it, and I was informed by Mr. McReynolds that Mr. Haller had either written him a letter, or sent him one requesting him to release ten feet around the building upon the payment of a certain sum of money, to which Mr. McReynolds had agreed if Mr. Haller paid it in a certain time——

Q. I want to know who it was you thought had this possible claim either to the easement, or the right to this strip? A. Mr. Haller, of course.

Q. You knew, that if Mr. Haller held it he would get it? You have told us that you heard from some source that somebody either was claiming, or might claim, a release to the 10 foot strip, or an easement in the 10 foot strip, or some right in the 10 foot strip. Now, what I want to know is—who was the possible claimant whom you thought might happen to have such a claim? A. Why, anybody except Mr. Haller. The information came to me about the release of a 10 foot strip, and, having some information about it, I wanted to find out all about it, because a notice had been brought home to me that there was a possibility of them getting this. I knew that if a lawyer has information he is bound by that information, and is put upon inquiry to find out all about it. I called to see McReynolds to find out all about this 10 foot strip. I
175 heard that Mr. Haller was to pay a sum and get it within a certain time, and that he had not taken it, and I was assured by Mr. McReynolds that that was all the information he had affecting the 10 foot strip, or any other part of that 10 feet of land.

Q. As a lawyer you also knew, did you not, that any rights that Mr. Haller had would be obtained by yourself if you bought all his rights? A. Why, certainly.

Q. So that, acting on your legal notice that you had some information, or some knowledge, outside of the record, you tried to see if some third person had an interest? A. I could see how a paper could be in existence affecting the land surrounding the Victoria flats, and knowing that if there was such a paper that there was sufficient notice attached to me to bind me by it, and I went to see McReynolds.

Q. You knew sufficient notice of whose rights? A. I never thought as to whose rights specially—that effect of it—but I knew that there was a paper in existence affecting any of that land surrounding the Victoria hotel, that I had sufficient notice to put me upon legal enquiry, and I went to McReynolds for the purpose of finding out, not whether Mr. Haller, or the second trust holders had any special rights, or easements, or anything else in connection with it at all—I went for the purpose of finding out just what that paper was.

Q. Of finding out whether anybody had any rights, or not—is that right? A. You can phrase it that way, but my object
176 was to find out what was in that paper, and how far and how it affected the land surrounding the Victoria?

Q. You have said that you thought you had two chances of getting your money, meaning, I presume, your investment and your profits? A. Yes, sir.

Q. One was by running the Victoria Hotel flats, and getting your money by that means—that was one method was it? A. Yes; Mr. Wood's theory was that the hotel could be made a success.

Q. Do you now say that Mr. Wood had that theory, and you had not? A. I didn't take as rosy a view of it as he did, although I thought it was well worth trying, and was willing to let him try it.

Q. You said, Mr. Talbott, that we had these two methods? A. Well, if I used the term "we" I meant Mr. Wood and myself.

Q. Now, you never had any idea, did you, that you and Mr. Wood would get your money out of the Victoria flats if it was deprived of the 10 foot strip, and of light and air over it did you? A. I think Mr. Wood's theory was to run the flats his idea was that we could make it pay.

Q. But you could not make it pay if you were deprived of air and light on two sides. A. Well, as long as we owned both sides that question did not bother us very much.

177 Q. You knew, did you not, that you could not get your money out of the Victoria flats unless it had light and air from that 10 foot strip, didn't you? A. Not necessarily. That question did not enter into our calculations at all because we owned all around it.

Q. You knew perfectly well, Mr. Talbott, that the hotel flats enterprise would be a financial failure if it was deprived of light and air on two sides of it? A. That question did not affect us at all—as a matter of fact we owned all around it.

Q. I am asking you, from your understanding of that building

whether it could be made a financial success if no light and air could be had on those sides? A. It was less valuable.

Q. Is that answering my question—as to whether you could make a financial success with those disadvantages. A. We had them.

Q. You not only had them, but you knew before you bought and went into the enterprise, that a ten foot strip had been agreed to by Haller and Duke? A. I knew that I bought Haller's interest in both lots.

Q. Do you wish to modify your previous statement—that you had an abstract, and continued that abstract yourself down to the time of the purchase? A. No sir; I do not wish to modify my statement. I had Mr. Wood's statement that he owned a half in the two lots, and that Mr. Haller owned the other half, and I did not
178 bother myself as far as the question went as to whether or not the ten foot had been conveyed in a separate conveyance. I don't recall that when I finished the examination that I learned of the conveyance of the 10 foot strip in the deed from Haller to Duke. In other words, I may have struck that deed, and knowing that a deed having been executed, not necessarily that deed, but having been notified or informed by Mr. Wood that he had a half interest, as soon as I struck the deed I would pass the deed with possibly no more than a cursory glance—then I might have information and might not.

Q. Do you know that the deed died by the separation of the 10 foot strip by the conveyance from Duke—to Wood? A. I can only give that by the fact that Mr. Wood advised with me about replacing the note that was lost by this old gentleman.

Q. What was his name? A. I believe it was Carter.

Q. Did Mr. Duke give a deed of trust to Carter securing the note? A. I think Wood gave the deed of trust note to Carter.

Q. Will your abstract show us? A. I have not the abstract.

Q. When you sign your deposition will you give us that information as to the lost Carter note? —. I am sure it was Wood; I did not have a thing to do with it. I only know that in a general way.

179 Q. Would not your abstract of title show that there was such a deed? A. Why, the abstract was not made up to that point. I did not continue the abstract in the way of writing it out at all. That abstract is now at the bank. That would not be here on the abstract. The bank has the abstract yet, but that would not show there at all. From the very nature of things it could not.

Q. You think that this Carter note transaction took place a long time before any of the transactions—did you not say that? A. Oh, no; not such a long time before—it was the time the old man lost the note. You can tell if you take into consideration the time of the blizzard. The matter was submitted to me.

Q. Who told you that this outlaying ground near the Victoria hotel or flats was worth $1.50 to $2.50 a foot? A. Well, when the first note was made of $4,000. to the First National Bank of Gaithersburg by Haller & Wood, the board of directors.

Q. Who put that valuation on it? A. B. H. Warner was one; a man by the name of German, I think, was another. Another man by the name of Pitman, I think, was another.

Q. What did Mr. Warner value the ground at? A. I am speaking from recollection entirely—they ran from $1.50 to $2.50 a foot.

Q. I am only asking for Mr. Warner's valuation? A. I
180 could not tell you. I think Mr. Warner put the 14th street side at $2.50, and Welling place at $2. a foot.

Q. Mr. Talbott, you had a conversation, did you not, with B. H. Warner, & Company about replacing the loan on the Victoria flats in case of a sale under the trust? A. Yes, sir; I had a conversation with Mr. B. H. Warner.

Q. When did that take place? A. It was either with Mr. Warner, or with Mr. Rheem, or Mr. Swartzell. I don't know Mr. Swartzell from Mr. Rheem.

Q. When did that conversation take place? A. That conversation was before the property was advertised.

Q. Before or during the pendency of the advertisement? A. It was either before or after.

Q. What is your best recollection about that? A. I could not tell you—it was either the time it was being advertised, or before it was being advertised.

Q. So that before the advertisement you were considering the matter of the sale, and your purchasing the property and mortgaging it? A. The conversation had with Mr. Warner, or Mr. Rheem, or Mr. Swartzell, I don't know which, was either after the property was advertised, or before, I don't know which, but we were not only considering the possibility of getting out of it, the possible way out of it, by mortgaging it, but any other way that we could get out, and I had this talk with Mr. Warner, or Mr. Rheem, or Mr. Swartzell, I am not sure which gentleman—I think Mr.
181 Warner and Mr. Swartzell. I think they were both in there at the same time.

Q. Where did this conversation take place? With Mr. Grayson at which you inquired of him what he would do if the Warner company should refuse to accept the interest? A. It took place in the Victoria.

Q. Did you have a telephone there? A. I don't know.

Q. Don't you know, Mr. Talbott, on reflection, that there was a telephone there at the time? A. No, I do not.

Q. You didn't *not* telephone down to Warner & Company, and inquire whether they would accept the interest? A. No, I did not have anything to do with the hotel, or the conduct of it.

Q. And you made no inquiry, as to this matter? A. I did not see, or telephone, or talk, with Mr. Warner, or to any member of the firm, on the subject. Those matters were left entirely to Mr. Wood, as I had nothing to do with the conduct of the hotel. I simply asked Mr. Grayson what he would do with the money in the event Warner & Company declined to receive it, and Mr. Grayson declined to answer the question, and I then told him that I thought the

money was just as safe in Mr. Wood's hands as in Mr. Grayson's hands.

Q. Now, having suggested an obstacle to the payment of this interest, you took no means to find out whether B. H. Warner would accept the interest? A. I didn't suggest an obstacle at all.

182 Q. Didn't you suggest the possibility of B. H. Warner & Company's refusal to accept the interest? A. That is a question we will argue. I simply made the assertion that many times when a deed of trust, on which the interest is overdue was not paid, that parties would foreclose and decline the interest and in the event that Mr. Warner did refuse the interest, I wanted to know what Mr. Grayson intended to do with the money.

Q. I didn't ask you that—I simply ask you what efforts you made to find out as to whether or not there would be any such thing as Warner & Company's refusal of the interest if tendered them? A. I have answered that.

Q. Do I understand you to say that you were conferred with, and did acquiesce in this suit of Wood against Duke? A. I objected to this suit, saying that it was rather against my judgment, but upon Mr. Wood's representation that it would be unfair to possible purchasers to have any question arise, and that in his opinion that Mr. Grayson would go so far as to represent that they had some interest in that 10 foot strip, and that as we wanted to ascertain our rights, that the suit had better be docketed, and I consented that he should do so.

Q. You were quite aware that any statements as to your rights over the strip which you thought essential, could be made at the sale, without instituting the suit—without having it advertised in the papers and driving persons away from attendance at the

183 sale? A. That would have been unpleasant, and, from our view of the case, unnecessary.

Q. Now, Mr. Talbott, there is a question I feel it my duty to ask: "Did you see the bill filed by Wood against Duke? A. I am not sure that I did. If I did I have no recollection of it.

NOTE.—Adjourned to meet on Monday night, Oct. 28th. 1901, at 8 o'clock p. m., at the same place.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

WASHINGTON, D. C., *October 25th*, 1901—
Friday, at 2 o'clock p. m.

Met, pursuant to agreement, at the office of Eugene Carusi & Sons, Columbian building, No. 416 Fifth street, northwest, on the day

above indicated, to continue the taking of testimony on behalf of the defendants in the above entitled cause:

184 Present: J. J. Darlington, Esq., counsel for the complainants; Charles F. Carusi, and John Ridout, Esqrs., counsel for the defendants, H. Maurice Talbott, Frank I. Wood, and The First National Bank of Gaithersburg. Jesse E. Potbury, Esq., counsel for the intervening petitioner, Fred Drew.

Whereupon H. MAURICE TALBOTT, a witness of competent age, one of the defendants, was called for further cross-examination, and testified as follows:

Cross-examination continued.

By Mr. DARLINGTON:

Q. Will you kindly look at the copy of the bill filed by Mr. Wood against Mr. Duke, which has been made an exhibit in this case, and state please, whether you saw it before it was filed? A. I am not sure that I did, but I think it is possible.

Q. What is your best recollection on the subject—that you did, or did not? A. My best recollection is that I did not see it.

Mr. DARLINGTON: Then I will ask you no questions about it.

Q. You refer in your testimony to "the first $4,000 loan"—what do you mean by that term of expression? A. I mean by

185 that that when Wood and Haller made the $4,000.00 note to the First National Bank of Gaithersburg. That note has been renewed from that time to this, and I refer to the first making of the note.

Q. What was done with the proceeds of that loan upon the bank? A. We went to the holder of the note—holder of the notes.

Q. Of what notes? A. Of the two, $2,000 notes that were then due.

Q. This was then virtually a transaction for the relief of the holder of two of the promissory notes secured by the McReynolds & Merriwether trust, was it? A. I think it was for the relief of Wood & Haller by substituting for the holder of the notes who wanted the money, another holder of the notes who would be willing to carry it.

Q. Do you know whether these two notes were due at the time of this transaction? A. I think they were; they were so stated to me to be due.

Q. The person who received the proceeds of this bank loan was Mrs. Alice A. Hill, was it not? A. I think so.

Q. And she was the same person, was she not, who was to give a release of the ten foot strip, if $4,000 of the loan secured on the Merriwether and McReynolds property was paid? A. That need not necessarily be true, nor do I know it to be true, because I think there were other holders of these notes besides Mrs. Hill

186 Q. My question was whether this agreement to release the ten foot strip was not in consideration of the paying of $4,000.

which release Mrs. Hill was to direct as holder of the other notes? A. That I don't know.

Q. You told us what took place in an interview between Mr. McReynolds and yourself? A. That was long after this transaction.

Q. Is that not what he told you about the transaction? A. I don't even remember that Mrs. Hill's name was mentioned in that transaction.

Q. You have referred to a new deed of trust placed upon what I call the McReynolds & Merriwether ground or tract, growing out of the loss of the note held by Mr. Carter. Do you remember who the trustees in that new trust were? A. I do not.

Q. Do you recall whether it was not a trust to Mr. Wood to McReynolds & Merriwether, the original trustees, securing a note which Mr. Carter lost? A. I do not; I only know that trust was given as a substitute for the lost note, and under the advice of Mr. Browning, Frank T. Browning, now deceased. It took that course. I did not think at the time that it was necessary.

Mr. DARLINGTON: I find this Wood—Carter transaction to be a deed of trust, and which deed of trust is dated April 3rd, 1899,
187 and recorded in Liber 2421 at page 26. Can we agree to that date and reference subject to objection.

Mr. CARUSI: Yes, subject to any objection as to its materiality, and reserving all other proper objections.

By Mr. DARLINGTON:

Q. In your purchase of Mr. Haller's interest in the Victoria flats, what agreement was there between you in regard to your providing for the second trust holders' claims within a certain period?

Mr. RIDOUT: That question is objected to unless there is some evidence that it was in writing. It is not competent to show any verbal agreement.

A. There was absolutely none. I notice that Mr. Haller has made such a statement in his answer, but it is absolutely and unqualifiedly false, and that is not all—Haller knows it is false.

Redirect examination.

By Mr. CARUSI:

Q. Did you acquire your interest in the flats property, and the adjoining property, before or after the so-called Grayson & Heald trust? A. Long after.

Q. How long after? A. 1897 and April 1899. The Grayson & Heald trust is dated December 1897, and the Grayson trust was in December 1897, and I purchased in April 1899.

Q. Mr. Talbott, who was it first told you that there was an agreement by McReynolds, or by McReynolds & Merriwether to re-
188 lease ten feet adjacent to the flats property? A. I am not sure about that, but I think it was more than likely that it

was Mr. Duke. Now, the circumstances of that were; first, that in conference with Haller & Wood and Duke, with reference to fixing those two men up on this $4,000. that was due, which took place well on to a year after I purchased. I think in that conversation I discovered that the Victoria hotel, which was covered in $18,000. in trusts was surrounded by ground that had $12,000. on it. I made some comment on that. At that time I was not interested in it at all. Now, afterwards, when it became at all probable that I would be interested in it, then I wanted to find out, having made some allusion to the fact, and how foolish a man was to build on the ground a house of that kind, and then put a trust upon the surrounding land, I was then informed by Mr. Haller that he, Haller, had taken care of that by getting an agreement from Merriwether & McReynolds to release ten feet of that surrounding land, so that it is possible that I heard that about the time the $4,000. loan was made and also about the time that I made the purchase.

Q. Did Mr. Haller, in referring to the existence of that alleged agreement, fix any date for it? A. No, he did not; that is the reason I wanted to see McReynolds.

Mr. CARUSI: I offer this paper in evidence as fixing the date of the alleged agreement.

(By Mr. CARUSI:)

189 Q. I hand the paper referred to to the witness, and ask him was any reference made by Mr. Haller to that paper, as constituting the contract, or as fixing the date, of the alleged agreement? A. This was the paper that he was referring to, but at that time I had not seen it.

NOTE.—Paper referred to, offered in evidence by counsel for the defendants, and marked Exhibit H. M. T. 5.

Q. You have said Mr. Talbott, that you told Haller how foolish it was for him to build, and yet you purchased his 1/2th of his equity in the flats property notwithstanding you discovered that there was no such agreement as the one he stated to you to be in existence? How do you account for that? A. After the conversation with Mr. Haller, in which he said he had a paper of the character, or kind, or Exhibit No. 5, but did not produce it, I went to see Mr. McReynolds and he disclaimed any such paper, but upon my insisting that such a paper must be in existence, he then spoke of this paper. It seemed to refresh his mind.

Q. You did not answer my question? A. In one moment I will come to that in my answer. Mr. Haller and myself talked the matter over, and I came to this conclusion. At that time you will remember that we had in Gaithersburg bank, estimates from five to six reputable real estate men in Washington city.

Mr. DARLINGTON: I must object to all reference to real estate men in Washington city who are not produced, and shall move to strike them out.

190 Mr. CARUSI: The examiner will strike that out of the record.

Q. Go on Mr. Talbott? —. I had reason to believe that the land surrounding the Victoria flats was worth from $2. to $2.50 a foot. Now, if you will understand that in making this purchase, I considered that I was practically made to purchase $2,000. worth of property with $116,000. of mortgage on it, or the other ground surrounding it had $12,000. of mortgage on it, you can readily see my process of reasoning.

Mr. DARLINGTON: I object to any testimony of the witness as to his processes of reasoning, and move to strike it out.

Witness continuing: We could try and run the Victoria hotel, and if it proved to be a failure we were under no moral or legal obligation to pay as much as one dollar of the debts that were on it. We had not contracted those debts, nor had we assumed them. Then, we would have the ground surrounding the Victoria hotel, with the $12,000.00 of indebtedness on it, which would be worth perhaps $20,000.00, or $22,000.00, at an estimated value of it, so that we could not lose much if any, by abandoning the hotel, and relying upon the ground surrounding it.

Q. Mr. Talbott, in your cross examination there was one question asked you a considerable number of times—that was how you came to be concerned with this question of the release of the 10 foot strip on the west and south of the house, or the talk of it? Now
191 the question I want to ask you — this—At the time you talked with Haller, or any other person, concerning the existence of this alleged agreement, was it asserted by Haller, or any other person, that any claim had at that time been made by any person to any rights whatever over the property adjoining the flats property, that is to say: over any of the property under the McReynolds & Merriwether trust? A. There was absolutely nothing stated as to any rights by anybody over this ten foot strip.

Q. I ask you if any claim was made, or that any person had made any claim in any way to any rights over the 10 foot strip in question? A. The only claim that I ever heard of, and the first time that that was asserted, was in the conversation with Mr. Grayson at the Victoria flats. That was about the time, or just a little before the time, the property was advertised for sale under the first trust.

Q. Another question which has been asked you in your cross examination that was not answered very satisfactorily, and indeed you did not answer it at all, was: What difference did it make to you whether the ten foot strip was or was not released since you held or owned the whole? That is to say, I will ask you the question again—since you owned Haller's equity in the Victoria Flats property, and also his equity in the property under the McReynolds & Merriweather trust, what difference did it make to you whether any ten foot, or any other amount of land, under the McReynolds & Merriwether trust, was released? A. I was not at all well when I had the previous

examination, and was suffering from a severe headache, and clearly did not understand that and several other questions. The
192 proposition to my mind was a plain one. The hotel property had $116,000. of liens on it. The ground surrounding it had $12,000. of liens on it. Now, if the hotel property was a failure, we had the ground surrounding it from which we could get our money, but we could not do that if the 10 foot strip had been released from the $12,000 deed of trust, and anything in the shape of an easement, or in any other form, would have been subjected to the $116,000. trust.

Q. How could the release of 10 feet from under the lien of one trust have subjected it under the lien of the other two trusts? A. If there had been any arrangement between any of the parties?

Q. Which parties? A. Why, either Haller or McReynolds, or the holders of the second note. Now, I was assured that there was nothing between these parties, and that the protection that Haller had was the agreement from McReynolds to release the 10 foot strip that was what Haller had, but I found that he did not have that.

Q. Well, notwithstanding you found that he did not have this protection at the time you purchased his equity under the McReynolds & Merriwether trust, you purchased his equity after the Warner & Wine and Grayson & Heald trust? A. Certainly.

Q. Evidently you did not place much value on this release? A. Not specially, for the ground was abundant security for the $12,000. loan, and I was sure that we could realize the loan out of it
193 at any time; that is to say, that if the holders of the $12,000. notes had wanted their money we could have gotten somebody else to have taken them; before I had bought that, Mr. Carusi, I wanted to be sure just what was in that paper; Haller did not seem to know what was in it, and I wanted to know.

Q. Did it occur to you at that time that a release from McReynolds & Merriweather to Haller or to you could possibly have affected any rights under the second trust, many months before the release had been made? A. Not at all.

Mr. DARLINGTON: Objected to as not calling for a fact in the case, but for the witness' opinion.

Mr. CARUSI: I want to know what was in the witness' mind.

(By Mr. CARUSI:)

Q. What was your state of mind? A. I had informed myself that the Warner & Wine trust and the Grayson & Heald trust, covered, by metes and bounds, a certain piece of land. Also that the deed of trust to McReynolds & Merriwether covered the surrounding ground, and no mention in any of the conversations was made by any person of any easement, or any right, of any of the holders of the deeds of trust to anything save and except the land covered specifically by their trusts, except the rather obscure or indefinite statement of Haller that he had a paper from McReynolds & Merriwether, by which he, Haller, could demand the release of the 10

feet surrounding the Victoria flats, and I started out to run that paper down. The first mention of the easement, or any claim of easement, was made by Mr. Grayson in a conversation had at the Victoria hotel.

Re-cross-examination.

194 By Mr. DARLINGTON:

Q. Mr. Talbott, I want to read you an answer of yours to a question of mine, page 35 of the record:

"A. The suggestions made either by Mr. Wood, Mr. Haller or Mr. Duke, about the ability of the holders of one of the trusts to demand a release of the 10 foot strip around the building. After satisfying myself about that I called to see Mr. McReynolds."

Q. Do you know how you came to testify that way at the last session? A. I had read that answer before you got in and came to the conclusion that the stenographer had made a mistake in transcribing it.

Mr. DARLINGTON: I have the same on my notes, and remember cross examining you on it; do you deny having said it? A. Of course I am not sure that this is the case. I cannot understand how I should have made such an answer, as no such claim was ever hinted or suggested, by the holders of any of the trusts. The suggestion, I think, was made by Mr. Duke, and commented upon by me with the result of my talking to Mr. Haller about it, and he claimed that he had a paper from McReynolds by which he could release, or have released, ten foot around the building. As at that time the owner, or the prospective owner, of one half of not only the building, but the lots surrounding it, and thinking the building might prove a success, and that we might have some possible difficulty with the land surrounding it, and also that the paper might contain something else besides what Mr. Haller said it contained, I thought it my duty to see Mr. McReynolds about it.

195 Q. Mr. Talbott, I would suggest to you that you have told us this several times over. It would shorten our labors for the remainder of the examination if you will just answer the questions. Let me read you an answer to one of my questions (page 38 of the record).

"*A.* The question was—whether Mr. Haller had the control or ownership of the 10 feet around the building. Now, if Mr. Haller did have that and these people could come in and take it?" A. Which people?

Q. The people who might possibly be owners of the Victoria flats at that time? A. If they could come in by taking the easement we would have that much less land."

—. Can you state how you came to use that language in view of the testimony which you gave us to-night? A. I will answer that by stating that the 10-foot strip cut very little figure in my investigation after I had been assured of the exact status of the paper filed. I refer to Exhibit No. 5, dated February 14th, 1898. But if that

paper had contained anything by which anybody could have had any control over the 10 feet surrounding the building, or easement, and the building had gotten away from us by a sale under the trusts, of which I was fearful, then my investigation would have been just that much less available.

Q. You thought that if there were third persons who might enforce some rights against the 10 foot strip, then your investigation would be less available. Is that it? A. Well, that is not exactly the view I took of it either, because I was looking to the pos-
196 sible loss of the building, and, therefore, wanted to be sure that there was nothing outstanding affecting the land surrounding the Victoria flats except what the record disclosed.

Q. You told us in your redirect-examination tonight, as I understand it, that it was never claimed that this easement belonged to anybody but Mr. Haller and yourself, and that the holders of those notes, those trust notes, were not considered. Is that right? A. No, sir; that is not right.

Q. Please set me right about that. That is the way I recollect your testimony to-night? A. There was never any question of an easement, nor was the word "easement" ever used between any of us, Haller, Duke, Wood, or myself, or anybody else, except at the conversation at the Victoria flats.

Q. What I want to get at is—whether I correctly understand your testimony tonight to the effect that whether this claim of release, or claim of any kind, was always understood to be a mere claim personal to Haller himself? A. None of the trust holders were mentioned in these conversations. It was brought about entirely by the fact that I knew that that building was on a line, and I spoke about it to him. He said that he had an agreement with McReynolds by which he could have 10 feet of it to the building on the line, and the surrounding land was under a deed of trust, subject to a deed of trust, and his answer to that was that he could have ten foot of it released at any time.

Q. Now, my question is whether I correctly understand you
197 to say tonight that your conversations with him and your investigations on the subject were made to discover, not whether the note holders had any such right, but whether Mr. Haller had any such rights, to claim either a release or an easement? A. As he owned both pieces of land I did not think he had any easement over it, and he never mentioned the trust creditors as having any rights save and except the rights given to them by their deeds of trust.

Q. So that I am correct in my impression that your talks with him, and your personal investigations, were limited to the claim in him, Haller, and not to a right in the note holders? Is that correct? A. I do not think the note holders were ever mentioned in these conversations. It was simply my suggestion that the building was built on the line, and his answer to that was that he could get 10 foot of it released.

Q. You also stated Mr. Talbott, that you knew that the B. H.

Warner trust, represented money on a building which was about to be erected? A. Yes sir, I suppose so yet.

Q. Did it not occur to you that these trust holders, whose money had been advanced in the construction of the buildings, and whose labor had been put into the building, should have some security for their money and labor?

Mr. CARUSI: That question is objected to as leading.

A. I had not examined the law at that time.

Q. I am not asking you for your legal opinion, Mr. Talbott,
198 I want to know whether it did not occur to you that these men who had advanced their money and labor on the security of the building to be erected, might have some rights. A. I was thoroughly satisfied that the rights of the holders of the notes secured by the Warner & Wire trust, and the Grayson and Heald trust, would be confined to the land specifically described in their trusts; and it never occurred to me once, either that they had any claim, or that they could make any claim, outside of the record.

Q. Now, let me read you your answer in this connection and an answer to a question of mine on page 31 of the record.

"It was not a question of release, but it was a question of ownership, of the ten foot strip; in other words, I wanted to see that the owners of the first trust, or the second trust, had any right to the ground surrounding the Victoria Hotel property." Is this answer correct? A. That answer is substantially correct. When Mr. Haller spoke of this release it occurred to me at once that the paper that he alleged that he had, but declined to show, might contain the matters that would seriously affect the owner, or owners, of the Hotel Victoria, or the ground surrounding it, or the trust holders of the trust paper. As I had frequently seen or heard of a paper alleged to contain one thing, and really containing another. That was the reason I was so anxious to see and know about the McReynolds paper.

Q. I am not asking you about your reasons for being concerned about the McReynolds paper. I am asking you about your statement at our last hearing that you wanted to see if the owners
199 of the Victoria flats had any right to the ground surrounding the Victoria flats in view of your testimony to night that the owners of the trust notes were neither spoken of, nor considered in that connection. A. That is absolutely true as far as I recollect—that they were not spoken of by Mr. Haller in this connection.

Q. Or by you? Or thought of by you. A. Oh, yes; they were thought of by me. They were thought of by me; I wanted to see this paper that Mr. Haller alleged that he had, to see how it affected, not only the owner of the hotel, or any of the lien holders, so that I have no doubt that I thought of the first and second trust holders of the hotel, as well as the McReynolds and Merriwether trust. In fact I wanted to know what that paper contained.

Q. Did you confer at all with any of the note holders to see what rights they claimed in the 10 foot strip? A. No, sir; I did not.

Q. You knew Mr. Warner very well, didn't you? A. I did.
Q. Mr. Wine also? A. Very well.
Q. Mr. Heald? A. Yes, I knew him very well too.
Q. Did you know any of the other parties secured? A. Well, that I don't know. I don't know who are the holders of the notes. The reason that I did not see any of them was because I was thoroughly satisfied that they could have no rights that the
200 record did not disclose.

Q. I thought you told us the other evening that you knew as a lawyer that any rights, or information, outside of the record, would put a prospective purchaser on enquiry? A. Certainly that is true, and when I knew the above statement I assumed that Mr. Darlington knew that I would concede that, and that was the reason I wanted to hunt this paper. When I found it, and found the contents of it, that settled it in my mind.

Q. You told us to night, Mr. Talbott, that according to your recollection, your inquiry at that time, and your conversations at that time, had related wholly to a right to release, and that you never heard of or discussed any question of an easement until Mr. Grayson mentioned it shortly before this bill was filed—is that right? A. That is absolutely true, so far as I can recollect. The discussion was entirely with regard to the release of the 10 foot strip.

Q. Now, let me read one of your answers at page 38 of the record? "It was not a question of the release of the McReynolds trust; it was a question as to the easement over it; the ownership, or the connection between the hotel, and the surrounding property." Is that correct? You can look at the page and see the question to which it is an answer. I do not wish to encumber the record with a repetition of the question? A. That is substantially correct,
201 and the explanation is easy. Mr. Haller had been, in answer to my suggestion that the building was on the line, speaking of his ability to get a release. Now I did not see that paper; he did not produce it; I did not know its contents, but what I did know was that that paper may have contained very much more, or much less, than Mr. Haller either thought or knew; that it might just as I have given in my answer, referring to answer on page 38, have been a question of an easement over it, the ownership of it, or it may have had some connection between the hotel and that property. That was the reason I wanted to see it. As it turned out, Haller lied about this as he has lied in his answer about our promise to pay the second trust notes. He did not have what he represented that he had.

Mr. DARLINGTON: I must object to irresponsive answers.

The WITNESS: Do you want the lie out.

Mr. DARLINGTON: Let it remain in the record.

The WITNESS: But at that time I had not seen the paper, and did not know the contents of it, and wanted to inform myself of that, because it may have very seriously affected either the land surrounding the hotel or the hotel, and Haller may have known it, or he may have known it, and not understood it properly.

Q. I want to ask you—if you won't favor me with short categorical answer- to a few questions? I will make them as short as I can, and hope you will answer them?

The WITNESS: Yes, I want to get away.

202 Q. You have told us that you supposed that the B. H. Warner & Company loan represented moneys loaned to Mr. Haller to erect a building not then existing when that loan was made, but which in part would be security for that money, have you not? A. Well, I so understood at the time.

Q. And you knew also that the Grayson & Heald notes representing, debts which depended for their security in part upon this building did you not? A. I did not know it, but I had heard so, and I presume it was true.

Q. And you further knew that Mr. Haller had placed this building in such a position that it would be very undesirable, or insufficient security, without some easement, or some right, to some of the adjoining ground, did you not? A. I don't know whether it would be sufficient security or not, because I assumed that Warner & Wine, and these gentlemen knew a long way more about that than I did, and as to the value of the building, or security, I am not familiar with real estate values, and therefore did not know. I, of course, knew that the building would be more valuable with more land around it, or with land around it.

Q. Mr. Talbott, you do not wish to be understood as expressing any doubt, that with the west and south windows closed, that
203 building would be inadequate security for $116,000?

Mr. RODOUT: This is certainly not re-cross examination.

A. I am not in a position to pass an opinion on that because I do not know.

Q. Have you not already testified that the building would be a financial failure with these two sides closed?

Mr. RIDOUT: Objected to as not a fair interpretation of the witness' testimony.

A. I have not so testified because I certainly do not know.

Q. And do you mean to be understood as stating that you consider, at the time that Mr. Haller placed this building in this unfortunate position, after he had gotten the Warner loan, and then giving it as security for the Grayson & Heald notes, when he was the owner of all the ground, was under no moral obligation to protect those parties against the depreciation of the security which would come from closing up the west and south sides of the building?

Mr. CARUSI: We object to that question as calling for the opinion of the witness—that question calls for Mr. Talbott's views or Mr. Haller's views of morality.

A. I was not dealing with Mr. Haller's views of morality. I did not know the value of the hotel property.

—. I have not asked you about the value of the hotel property?

The WITNESS: I do not know the value of the hotel property, and did not assume anything about Mr. Haller's treatment from a moral standpoint of the people with whom he had been dealing;
204 nor did I presume to judge as to the treatment he was giving them.

Q. You did not consider it your business, is that it? A. Well, not exactly that either. I did not take that into consideration, yet knowing myself the value of what I always considered to be two separate and distinct pieces of property, and the hotel property, Mr. Wood, always holding he could make a success——

Q. Did Mr. Wood, to your knowledge, hold that he could make a success of the hotel property with the windows on the south and west sides closed?

Mr. CARUSI: That question is objected to because it has already been answered.

A. I don't think we ever discussed Mr. Wood's running the hotel with those windows closed.

By Mr. DARLINGTON:

Q. Are you unwilling to state that you knew then and know now that the closing of the west and south openings would ruin that property—the Victoria Hotel property?

Mr. CARUSI: Question objected to as calling for an opinion.

A. I can only state that, not being an architect or a builder, and never having owned a hotel before, and hoping never to own another one, I could not tell whether it would ruin it, or whether it would not. Of course, I do not mean for one moment to say that I do not know that the closing of the south and west windows would not affect the hotel, but how much I do not know.

Q. You did not know whether or not it would injure it seriously in value?

205 Mr. CARUSI: This is entirely a question of opinion.

A. This is entirely a question of opinion, and the word "seriously" is one word hard to define. Therefore, I am not prepared to answer this question.

Q. Now, was there anything with respect to the situation of the Victoria Flats property with reference to the adjoining ground, which you did not know before you made your purchase as well as you know now?

Mr. RIDOUT: That is objected to as having already been asked and answered.

A. Well, the thing that I know now that I did not know then, and that in my opinion nobody else knew then, is that there is an alleged claim of an easement over a certain portion of the ground surrounding the hotel for the benefit of the second trust holders.

Q. Except for that claim of easement you knew the situation as well before you bought as you do now?

Mr. RIDOUT: We make the same objection.

A. Are you referring to the land itself, or are you referring to the condition of the titles; and the respective interests?

Q. I am referring to the location of the Victoria flats, and its dependence upon the surrounding ground for light and air.

Mr. RIDOUT: Objected to as there is no evidence of that dependence except in law.

A. I can answer this—that I knew the hotel or was informed that the hotel was on the line.

Q. Were you not aware at that time that a purchaser with notice does not escape a moral, legal, or equitable, obligation, which such notice imposes upon him?

Mr. RIDOUT: Objected to as calling for a legal opinion.

206 A. That depends upon the kind of notice, and if you will kindly tell me what kind of notice I would be very glad to answer it to the best of my ability.

Q. You have told us that you knew the Victoria flats was built upon the line of the adjacent ground? A. That it was on the line.

Q. That this was done by Mr. Haller after he had negotiated his loan from the Warner Company; that he had given this building so situated to the Grayson & Heald people when he was the owner of all the ground, and you have said that you bought this property under the idea that if the hotel failed you could drop that and make your money out of the adjoining ground, as you were under no moral obligation to see that the trust notes were paid; and you further said that you did not consider yourself responsible for Mr. Haller's moral obligations.

Mr. CARUSI: The witness has stated that he considered Mr. Haller under no moral obligation, but refused to pass upon any such question.

Mr. DARLINGTON: I submit this witness needs no cues from any source. He is an intelligent gentleman and a lawyer.

Mr. DARLINGTON: Resuming my question, I wish to ask the witness whether knowing all these facts that he did not also know that a purchaser knowing these facts would rest under the same moral obligation as his vendor would?

Mr. CARUSI: Objected to on the same ground?

Q. I had nothing to do with the moral aspect of Mr. Haller's dealings, and expressed no opinion about that. He certainly in
207 all of the negotiations had with me did not express himself in such a manner as to the second trust holders, as would impress me of his moral obligation, because he was always saying that he was satisfied that they could be bought out at a large dis-

count. As to the legal opinion asked for in this question I have given it in the preceding answer.

Q. Kindly look at Exhibit H. M. T. 1. dated March 28th, 1899, and tell me in whose handwriting that body of that is? A. That is my own, sir.

By the examiner.

H. MAURICE TALBOTT.

Subscribed and sworn to before me this 5th. day of May, A. D. 1902.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL. }
vs. } In Equity. No. 20773.
FRANK I. WOOD ET AL. }

WASHINGTON, D. C., *November* 22, 1901,
Friday, at 8 o'clock p. m.

Met, pursuant to notice, at the residence of J. J. Darlington, Esq., No. 1610 20th street, northwest, on the date above indicated, to continue the taking of testimony on behalf of the defendants.

208 Present: J. J. Darlington, Esq., counsel for the complainants; Jesse E. Potbury, Esq., counsel for the intervening petitioner, Fred Drew. Charles F. Carusi and John Ridout, Esqrs., counsel for the defendants, H. Maurice Talbott, Frank I. Wood and The First National Bank of Gaithersburg, Md.

Whereupon FRANK I. WOOD, a witness of competent age, called for and on his own behalf, being one of the defendants, having been first duly sworn according to law, was examined and testified as follows:

Mr. CARUSI: I wish to ask the witness about two questions.

Mr. DARLINGTON: I do not object to that.

By Mr. CARUSI:

Q. Mr. Wood, what do you know about the letter which is put in evidence here—the letter from Mr. McReynolds which has been referred to as the alleged agreement to release part of the ground around the Victoria flats? A. I know this about it—when Mr. Haller and myself were negotiating regarding the exchange of properties, James J. Lampton, a real estate broker of this city, was also negotiating with him for the exchange of some properties for his interest in the Victoria flats, and he had some clients who wanted to exchange some properties who would not deal with Mr. Haller unless he could get additional ground around the Victoria hotel,

209 and Mr. Haller consented to sell him ten feet additional, and Mr. Lampton went to Mr. McReynolds who was one of the

trustees, and he wrote the letter which was filed in evidence addressed to Mr. Haller, which letter stated that he would release that ground upon the payment of the $4,000. which was then overdue. There were two $2,000. notes that were then overdue at the date of that letter; that is the reason why that letter from McReynolds was given—it was written by Mr. McReynolds.

Cross-examination.

By Mr. DARLINGTON:

Q. How did you learn these facts, Mr. Wood—about that McReynolds letter? A. Mr. James J. Lampton told me with his own lips.
Q. When? A. Since the commencement of this suit.
Q. Is that the first you knew of it? A. That is the first time I knew how it was obtained.

Mr. DARLINGTON: I object to all this testimony as being hearsay.
The WITNESS: It is not hearsay.
Mr. DARLINGTON: I also object because it was learned by the witness at a date when it could have no hearing upon the rights of the parties.

Q. Mr. Wood, you were to bring certain paper with you—have you them here? A. I have them here with me, Mr. Darlington, yes sir.
Q. You asked me for the deed of trust, and the release, also the paper which you call Mr. Duke's receipt. I think those are all the papers you asked me for.
210 Q. Do you know in whose handwriting these three papers, or any of them, are? A. That seems to be in Mr. Duke's hand-writing, (referring to the Duke receipt).

Mr. DARLINGTON: I offer that paper in evidence, and ask that it be copied into the record.
NOTE.—Paper referred to offered in evidence by counsel for the complainants, and marked by the examiner Exhibit W. H. No. 1, and copied into the record as follows, the original being returned to Mr. Wood by agreement of counsel.

"Received, Washington, D. C., April 9, 1898, of N. T. Haller, a deed from Nicholas T. Haller and wife to Bernard A. Duke. The said deed conveys p'ts lots 1 and 2 block 45 of W. C. Hill's sub. of University Park. The property to be held in trust for N. T. Haller & Frank Ivey Wood ½ interest each.
(Signed) BERNARD A. DUKE."

Q. In whose hand-writing is this paper? (Referring to release to Frank I. Wood, dated August 18th, 1898, and recorded in Liber 2377 folio 377.) A. The body of that release is in my own hand-writing.

Mr. DARLINGTON: I offer that in evidence and ask the examiner to copy it into the record.

NOTE.—The release referred to put in evidence and marked by the examiner Exhibit T. W. No. 2.

Q. What do you know about the deed of trust? A. Of the deed of trust I know nothing at all.

211 Mr. CARUSI: I wish to have an objection noted on the record as to the admissibility of this receipt, as it is irrelevant and immaterial.

By Mr. DARLINGTON: What is this paper? A. Deed of trust from Nicholas T. Haller *et ux.* to Alexander H. Holt and Frank A. Sebring, trustees.

Mr. DARLINGTON: I offer that paper in evidence and ask the examiner to mark it.

NOTE.—Deed of trust offered in evidence by counsel for the complainants, and marked Exhibit H. No. 3.

Q. Is it true, Mr. Wood, that you and Mr. Haller were to have equal interests in the flats property? A. Yes, sir; at that time I would say.

Q. What does that qualification which you just put to your answer mean?

The WITNESS: Do you mean now?

(By Mr. DARLINGTON:)

Q. No at that time? A. Yes, sir, our interests were equal.

Q. Was there ever a time before Haller sold to Talbott, as you claim, that your interests and Mr. Haller's interest were not equal? A. I don't understand your question.

Q. Was there ever a time before the transaction between Haller and Talbott—that your interest and Haller's interest were not equal? A. It is true that they were equal at all times. You are speaking about the flats property?

Q. Yes, sir—I am speaking about the Victoria Flats property? A. Yes, sir.

212 Q. Did you purchase your half interest in the entire property there, that is, what they call the McReynold's property and the Victoria Flats property, at the same time? A. I purchased the flats property, and a portion of the land that is covered by the McReynold's trust at one time.

Q. What portion? A. The ten feet additional from Mr. Haller at the same time that I purchased the Victoria Flats property.

Q. On what side of the building? A. On the south and west sides of the building.

Q. Why was that separated from the rest of the property—the rest of the McReynolds property? A. Because I wanted additional land.

Q. Why? A. I thought it better for me to have additional land. I did not want anybody else to purchase the adjoining land and build there; I preferred to have additional ground.

Q. Why? A. I have given you the reason why.

Q. For what purpose? A. To prevent anybody from building so close to me.

Q. Now, please tell me what the objection was to building so close to you? You say you did not want anybody to build close up to you? A. I did not want anybody to build close up there; I did not want anybody to build close up there—that is the reason.

Q. Why did you not want somebody to build close to the flats property? What disadvantage would you be put to—to have somebody build up next to the flats property on the south and
213 west sides——? A. I didn't know that there would be any advantage.

Q. I asked you—what disadvantage there would be? A. I wanted some space there.

Q. Space for what purpose? A. I told you the purpose.

Q. For what purpose did you want space—why did you want space there? A. I cannot tell you any more than I have told you—that I wanted additional land surrounding the building.

Q. There is nothing about the building that required additional land, is there? A. I cannot say that there is.

Q. Was there at that time? A. I cannot say that there was.

Q. You have no particular reason for having wanted it—you just wanted it? A. It is a commou thing for a man to want a good deal of land, is it not?

Q. Mr. Wood, what I want to get at is—why you wanted that ten foot strip? A. There was really no necessity for it, but a general desire to have land. I don't think there was any real necessity for it, but I thought it a good thing to have, and for that purpose and reason we agreed on the 10 foot strip of land.

Q. You are unable to assign any reason for wanting this 10 foot strip? A. I didn't want anybody to obtain control of the adjoining land and build close up to the Victoria flats. I preferred a
214 strip around it.

Q. You had no good reason why you wanted this 10 foot strip of land on the south and west sides of the Victoria flats? A. No more than I have told you.

Q. You haven't stated any reason to me for desiring that strip of land? A. I tried to make myself plain to you.

Q. You told me you wanted it because you wanted it? A. I told you why I wanted it.

Q. You did not tell me why it was necessary and desirable to have that ten foot strip of land? A. It was a very good thing, I thought, to have.

Q. But you cannot give me any reason that made it desirable to have? A. I did not want anybody to have control of it, and build up next to us. I wanted a space all around the building—more than there was around it.

Q. If they had built up close to you on the south and west sides—how would that affect your property? A. I cannot say or see how that would affect it. I simply did not intend they should build up close, and so took the precaution to prevent it.

Q. You did not then know, and do not now know, of any injurious effects that would result to the Victoria Flats property—if any person had built upon the adjoining ground, or the 10 foot strip? A. I cannot say that I did.

Q. You do not now know? A. I cannot say that I do, except what I stated.

215 Q. Did you know, or do you know, that all the light and air on the south and west sides of the Victoria flats would be lost if the ten foot strip was built upon? A. I cannot say that I did, or do.

Q. Can you say that you did not? A. I simply had in my mind the getting of that land. I have answered the question repeatedly. I have nothing in the world to conceal.

Q. You do not mean to deny the fact do you, that you know that if anybody else should build up against the Victoria Flats property on the west and south sides—that all of the windows and air openings, and light, of those sides would be closed, do you? A. That is a matter of opinion—whether it would or would not is a matter of opinion.

Q. How would a matter of opinion affect the light and openings of the Victoria flats, if the land surrounding the Victoria flats were built upon up against the flats? A. You said they were all closed, there are recesses—there are spaces up there.

Q. I ask the question again—please tell me how a matter of opinion would affect the light and air openings if houses were built all up against the flats property?

The WITNESS: That is what I said you said—I said it would be a matter of opinion.

Q. I ask you—do you deny that if this land surrounding the Victoria Hotel property was built upon close up to the flats property, that the flats would be deprived of light and air? A.

216 No, sir.

Q. If anybody should build up against the west and south lines right up to the line of the openings for light and air, those two sides would be closed? You knew that didn't you?

Mr. RIDOUT: That question is objected to as none of the questions asked by counsel contain the element of the height of the adjoining buildings, and none of the questions are relevant to this issue.

Q. Mr. Wood, suppose the owners of what we call for convenience, the McReynolds ground, should cover that ground by a building running right up to the south and west walls of the Victoria flats—you know, and knew at the time you purchased that ground adjoining, didn't you, that that would close the doors and windows on those sides, and deprive the flats property of light and air? A. I didn't know that anybody would build up there.

Q. That is not the question—please answer the question which I have just asked?

The WITNESS: You are asking me if they did; there is no possible way that they could build up there.

Q. Have you any objection to telling us whether you knew when you purchased that ground that if a building should be erected on the south and west sides covering this ten foot strip—that that would close the openings?

The WITNESS: The full height of the building do you mean—that it would close all the openings?

A. Yes—whether it would?

Q. It would not close all the openings? A. Why?

Q. For the reason that there are a number of spaces in these walls.

217 Q. You mean recesses? A. Yes, sir, that is what I mean. There are several of them on those sides.

Q. Do you think that anybody would not know that it would injure the flats property seriously if the doors and windows were closed up? A. I don't know.

Q. Then, if it would not—please tell us why you wanted the ten foot strip on the south and west of that building? A. I didn't say that if you had recesses.

Q. Why not if you had recesses? A. I did not say that recesses entirely obviated everything. I evidently did not make myself plain.

Q. You have told us that Mr. Duke was trustee for Mr. Haller in certain transactions before this time? A. Yes, sir.

Q. Was he trustee for you also in certain transactions before this time? A. No, sir.

Q. Are you sure about that?

The WITNESS: You mean trustee under a deed of trust?

Q. I mean trustee in any way? A. He never held property in trust for me.

Q. I asked you if you conveyed over to Mr. Duke in trust any property? A. I never did.

Q. No trust of any kind? A. No sir, except he was a
218 trustee in a deed of trust; he was a co-trustee in a deed of trust given by me, but he never held any property for me.

Q. How did he come to be a trustee in that deed of trust? A. That was a transaction with Mr. Lampton and he was put in as a trustee.

Q. Who nominated him for that office? A. I cannot tell to save my life about that.

Q. Don't you know that you nominated Mr. Duke as trustee in that case? A. I could not say. Mr. Duke and Mr. Pitman were nominated under the deed of trust referred to by me; probably Mr. Lampton nominated him as trustee, as Mr. Duke had business transactions with Mr. Lampton.

Q. I asked you if Mr. Duke was nominated trustee in that case by you? A. I cannot say that I did.

Q. Can you say that you did not? A. To the best of my recollection I did not. I do not think I did to the best of my recollection.

Q. Now, you have not answered the question which I asked you some time ago, which is—whether you bought an undivided interest

in the flats property, and also in the McReynold's property at the same time?

Mr. RIDOUT: I object to that question on the ground that it has been asked the witness and answered by him.

A. I bought the flats property, and the ten feet additional ground covered by the McReynold's trust at the one time, and the remainder of the land covered by the McReynold's trust at another time.

Q. How widely apart? A. I should say off-handed, about six months.

219 Q. What did you give for the McReynolds part of it?

The WITNESS: The McReynold's part you mean?

Q. Yes? A. If you mean the remainder part of it I bought it in July I think, 1898; I gave $250. for it, or for half of his equity in it.

Q. Is that all? A. That is what I gave him, and I have paid a considerable amount of interest since.

Q. At the time you bought it in July, 1898, his entire equity in that ground was figured at $500. and you gave him $250. for half of his equity? A. I gave him that amount for half of his equity and took, title to all of it.

Q. Why did you do that? A. Simply because he wanted to convey the remainder to me.

Q. But why did you do that? A. He simply conveyed it to me and I was perfectly willing to take it; there was no reason that I know of.

Q. Did you ever before purchase half of a piece of property and take a deed for all from a man you were dealing with? A. If he was willing that I should hold it in trust. He was willing in this case that I should hold his half in trust.

Q. You didn't ask him why he did that? A. He asked me to take it.

Q. You do not know why? A. I do not.

220 Q. You did not make inquiry or care to know? A. I must say I did not care.

Q. Can you explain your absence of curiosity upon that subject? A. Well, I don't know. I owned a half interest in it, and he conveyed the whole to me.

Q. Think before you answer this question, and then tell us if you are correct in stating that you bought the ten foot strip as a separate piece, and not under an agreement that you should hold it together? A. I bought them at the same time. They are separate pieces of property in every sense of the word.

Q. What made them separate? A. One was covered by the McReynold's and Meriwether trust.

Q. I want to know whether you bought them with the understanding that they were to be held as separate parcels, or with the understanding that they were to be held together as one property? A. I cannot say that I ever thought anything about that, Mr. Darlington at all. I don't remember anything about that at all.

Q. You don't remember then that you bought the ten foot strip as

a separate investment and to be held separate from the flats property, if you wanted to separate it, or whether you bought them to be held together? A. I suppose I could part with any piece of property I wanted to.

Q. Mr. Wood, answer my question? A. I am trying to answer it.

221 Q. Was the deed to Duke and the receipt you brought here to-day the only written agreement you had with respect to that purchase? A. That is all I had, sir.

Q. No other writing relating to that? A. No, sir, no other writing that I recollect.

Q. Was there no agreement, verbal or written, that the Victoria Flats property, including the 10 foot strip, should be conveyed to a stock company and held together?

Mr. CARUSI: That question is objected to.

A. The plan was when I bought that to put it into a stock company.

Q. My question was whether there was an agreement between you and Haller to do that? A. There was an agreement between us that we were to organize a stock company, and were to obtain a loan on the property and clear up this encumbrance if we could get a loan. I think it was a verbal agreement; that is what I intended to say.

Q. I wish you would think a moment and tell us whether that was in writing? A. My recollection is that I prepared articles of incorporation, but that is all there was to my recollection.

Q. Well, if there was such an agreement, either verbally or in writing, you do not claim, do you, that the ten foot strip should be separated from the Victoria flats? A. I claim it was not a part of it.

Q. Please look at the paper which I now hand you and tell us whether your name, at the foot, is your signature? A. I will have to read it.

222 Q. You can tell us whether that is your name and read the paper afterwards? A. (After looking at the bottom of the paper.) That is my signature there, sir.

Q. Now, you can read the paper if you want to, and if you want to correct your statement you can do so? A. My recollection is that it was verbal at that time.

Q. Did you write that? (Indicating the paper) A. That is my signature, I wrote that.

Q. The whole paper is in your hand-writing? A. Yes, sir; it is.

Q. Now, refreshing your recollection by that paper, please tell us if there was not an oral agreement to form a stock company, and convey the ten-foot strip and the Victoria Flats property to that stock company? A. No, sir.

Q. Was he not to convey the whole property including the ten foot strip? A. Not for the benefit of any one alone.

Q. I simply ask you if you can refresh your recollection by that paper? You don't recollect that there was an absolute agreement

including the ten foot strip not to be separated—between Haller and yourself? A. There was no such agreement not to separate the property; it was simply to be conveyed to a company when organized.

Q. Now, do you now recollect, after looking at that paper, that your interest and Haller's interest, were not to be equal,
223 but you were to pay him $7,000. out of the transaction? A. Yes, sir; pardon me, Mr. Darlington—let me look at the date of that paper.

Q. What is the date? A. It is April the 5th, 1898.

Q. Practically contemporaneous then with the Duke deed which is dated March 31st. 1898? A. My recollection is that the deed was not acknowledged until the 9th of April.

Q. According to the record it was deeded from Haller to Duke? A. Yes, sir.

Mr. DARLINGTON: I offer this paper in evidence and ask that it be copied into the record.

Mr. RIDOUT: Objected to as immaterial, and irrelevant to this issue.

NOTE.—By request *for* counsel for the complainants the paper referred to is copied into the record as follows:

"In consideration of the sum of $1., the receipt of which is hereby acknowledged, and the conveyance of lot G and east seven feet nine inches front by depth thereof of lot F of square 226, the deed for which has been executed, Nicholas T. Haller hereby agrees to convey to Frank Ivy Wood, an undivided one half interest in the parts of lots 1 and 2, block 45 of W. C. Hill's subdivision of University Park contained within the following metes and bounds, viz.; Commencing at the southwest corner of 14th street, and Welling place, and thence running southerly 130 feet, thence westerly 134 feet, thence northerly 130 feet to Welling place, and thence west-
224 erly 134 feet to the place of beginning.

And the said Nicholas T. Haller further agrees that he will without expense to said Frank Ivy Wood, cause said lots 1 and 2 to be released from operation of the deed of trust, dated December 28th, 1897, and recorded in Liber 2205, folio 254, to secure the payment of $34,000.00.

It is also mutually agreed that the said Nicholas T. Haller and Frank Ivy Wood will as soon as practicable organize a company with a capital stock of $200,000. for the purpose of owning and conducting an apartment house known as the Victoria, now located on said lots 1 and 2, block 45 and that they will convey the said described parts of lots 1 and 2 to the company subject, however, to the indebtedness aggregating about $119,437.00, and for their equity in said property accepting certificates of stock in said company equal to the difference between the amount of said indebtedness and the total amount of the capital stock.

Further, the said Frank Ivy Wood, agrees that of the portion of the capital stock received by him in said exchange he will assign

to said Nicholas T. Haller, certificates of stock to the amount of $10,000.

In witness whereof, the parties have hereunto set their names and affixed their seals this 5th day of April, 1898.

(Signed) N. T. HALLER. [SEAL.]
FRANK IVY WOOD. [SEAL.]

Witness:
J. H. MERIWETHER.

225 Q. Is that in your hand-writing? A. I will say that this is in my hand-writing.

(Referring to above paper.)

Mr. CARUSI: We reserve our objection to the instrument, as it is immaterial and irrelevant to the issue.

By Mr. DARLINGTON:

Q. You say you told Mr. McClure that you would not attempt to assist Mr. Grayson to get his money out of the flats property. Is that correct? A. I think that is what I testified to—to the best of my recollection it is what I told him.

Q. What assistance did you mean you would give McClure that you would not give Mr. Grayson?

The WITNESS: What assistance?

Q. Yes, sir—that is what I asked you? A. I wanted to get this loan, and bring it within $100,000. They would not scale their notes down, and I could not negotiate the loan on the property for enough to pay them off.

Q. Didn't you testify that you tried to purchase Mr. Grayson's notes? A. I did not try to buy his notes.

Q. You made the offer to Mr. McClure, to purchase his notes? A. I did not put that in that form; you put it in that form.

Q. Why did you tell Mr. McClure that you would not help Mr. Grayson to get his money when you were trying to help Mr. McClure scale his notes? A. I don't know that I could prevent him at all, or aid him, in any way at all, in getting his money.

226 Q. What was the relevancy or meaning of that remark at the time you made it to Mr. McClure? A. I don't know that it had any meaning. I simply felt hurt, at Mr. Grayson's remarks, but our subsequent conversations, or interviews were very pleasant.

Q. What I want to get at is this—according to Mr. McClure's statement you were willing to make some arrangements about his claim by agreeing to have McClure scale his notes, and not have Grayson get his money. How do you make the distinction? A. I was powerless to make any distinction. I felt hurt at Mr. Grayson's brusque treatment of us, and I explained to Mr. McClure all these facts in relation to how we were trying to get the loan of $100,000 and pay off the indebtedness due on the Victoria Hotel property, and I told him also of the treatment we received from Mr. Grayson, and expressed myself that way to Mr. McClure.

Q. You didn't go to see Mr. McClure after you abandoned the getting of the loan, did you? A. I think we went there that night.

Q. You went there that night? A. I think so; I think we went to Mr. Haller's and then saw Mr. Grayson, and Mr. McClure, all at the same day.

Q. At the time you saw Mr. McClure, you still held on to this scaling of the loan to which you referred in your direct testimony?

A. All the same day.

227 Q. How could you help McClure and not help Grayson? A. I did not have any desire to help McClure to the exclusion of any one, and could not have helped one unless I helped the other one. If I could have gotten the loan, and they had scaled down their claims they would have all been paid alike.

Q. What was the relevancy then of that remark you made to Mr. McClure?

Mr. CARUSI: The witness said he did not care whether Grayson received anything or not.

Mr. DARLINGTON: Counsel's recollection does not help the situation any.

The WITNESS: I said I would not attempt to assist him Grayson, in getting his money out of the flats if he would not assist us, or help us, or assist us, in the matter. We could not get a loan large enough to pay all in full.

Q. Now, my question is, Mr. Wood, whether you can give any intelligent application or relevancy to that remark? A. I don't know that I can, Mr. Darlington, in that way.

Q. You say that Mr. Grayson came to see you at the Victoria flats? A. Yes, sir.

Q. At that time he did not tell you what he wanted with the money—he asked you to give him, is that correct? A. He did not tell me—that is right sir.

Q. He expressly declined to state what he would do with the money if you let him have it?

228 The WITNESS: You mean whether he wanted it for Warner—for the Warner interest?

Q. Didn't he tell you that he wanted the money to pay the interest? A. I didn't say that he would not tell us. Mr. Talbott asked him there what he would do with the money in event Mr. Warner refused to accept it, and he said he declined to tell us what he would do with it. That is my recollection.

Q. I read from pages 12 and 13 of your direct examination. "Q. Did he tell you what he was going to do with the money? A. No, I could not say that. He did not. We all entered into a general conversation in regard to the matter. Mr. Talbott said that he was sorry that any one should lose in the matter. He said "Mr. Grayson, if we turn over this money to you, what would you do with it if Mr. Warner refuses to accept it?"

Q. That was the interview at the Victoria flats? A. Yes, I refer to the Victoria Flats interviews. There were several interviews.

Then Mr. Grayson refused to tell what disposition he would make of it.

Q. Look at the record pages 12 and 13, and satisfy yourself about that. A. (After reading the same.) That is all right.

Q. Now, having refreshed your memory by reading your statement at pages 12 and 13, I want to ask you if you did not know perfectly well what Mr. Grayson wanted with that money?

229 A. Only what he stated in those two letters making formal demand for the money, and what he stated he wanted for part payment of that interest.

Q. And he stated if it was not enough he would make up the balance? A. I think he did make that statement.

Q. You further said that Mr. Talbott asked him what he would do with the money if Mr. Warner would not take it? A. Yes, sir.

Q. That was after you refused to turn over the money? A. That was after I said by advice of counsel I refused to turn over the money as contained in his formal demand.

Q. No matter what he would have done with the money in case Warner refused to accept it—you refused to give it to him? A. Yes, sir, I refused to give it to him.

Q. Without any conditions whatever whether Warner would accept it? A. What do you mean?

Q. I want to know whether you refused to give the money to him without any conditions? A. Mr. Darlington, Mr. Grayson came to my residence and delivered that writing to me, and I then consulted with my attorney, and then told Grayson that by advice of counsel I refused to turn over the money to him.

Q. The question is—what he would do with it if Warner refused to accept it did not enter into it? A. When Mr. Grayson

230 subsequently called I told him that by advice of counsel I declined to give him the funds in my hands.

Q. What he would do with it if Warner refused to accept the interest did not enter into it? A. I told him by advice of counsel I refused to give him the money.

Q. And you had the money? A. I had the money.

Q. Now, Mr. Wood, not asking you to tell us anything that took place between your counsel and yourself, I would like you to give us some reason why you refused to turn over the rents to the man who would pay the interest on the $75,000. trust and make up the deficiency of interest? A. I don't know.

Q. What reason was there for not turning over the rents, to the man who would make up the deficiency, remove the default, and save the property, the Victoria flats, from sale by auction? A. I didn't know that he would do that. I simply had his statement to that effect.

Q. Did you propose to go on with the collection of those rents and not pay the interest on the trust? A. I did not.

Q. Did you intimate to him that you refused to turn over the money to him because you doubted whether he would fulfil his promise? A. I did not.

Q. Did you ask any security from him for the money? A. I do not think I did.

Q. Don't you know whether you did or not? A. My recol-
231 lection is that by advice of counsel I refused to turn over the money to him.

Q. Did you yourself want to avoid the sale? A. Did I want to avoid the sale?

Q. Yes. A. Mr. Darlington, why should I want to avoid that sale?

Q. Answer the question?

Mr. RIDOUT: Objected to as not calling for testimony relevant to this question.

A. I don't know that I could help it from being sold for default in the payment of interest.

Q. Did you or not desire to avoid that sale? A. I did not know that I had any desire at all about it.

Mr. RIDOUT: I make the same objection.

Q. Did you want to be sold out? A. It just resolved itself into this—we were going to be sold out, and I did not care whether it was sold out under the 1st or the 2nd. trust.

Q. It would not have been sold out if a man was anxious to pay the balance of the interest due? A. I don't know that he was generous enough to pay the interest.

Q. Didn't you just say that Mr. Grayson said he would pay up the interest? A. That is what his note states.

Q. Then, I will ask you again—did you desire to avoid that sale? A. I don't know that I had any desire about it.

Q. You have told us that the interest was in arrears because the rents were insufficient to pay them? A. Yes, sir.

232 Q. Can you explain why the interest was not in arrears when Mr. Warner collected the rents?

Mr. RIDOUT: Question objected to because there is nothing to show that the interest was not in arrears.

A. No, sir.

Q. Can you explain why, since the property has been put into the hands of receivers, all of the arrears of taxes and interest have been paid, and that the property is proving to be a good investment? A. I do not know that that is so.

Mr. DARLINGTON: I offer in evidence the report of the receivers in the case, showing the fact that the receivers have paid all the arrears of taxes, and all the arrears of interest, and have a surplus to pay on the second trust notes.

Mr. CARUSI: Objected to as irrelevant and immaterial. I also object to the report of the receivers because it has not been verified.

Q. You had a telephone in the Victoria flats at the time Mr. Grayson called there, did you not? A. Yes, sir.

Q. Where was that telephone? A. In the drug store.
Q. That drug store is in the same building? A. Yes, sir.
Q. Did you and Mr. Talbott go into the drug store and inquire by telephone whether there would be any difficulty about Mr. Warner accepting the interest? A. That interview occurred between 6 and 7 o'clock in the evening, and I don't know that Mr.
233 Warner remained at his office that late at that time.
Q. You are aware that Mr. Warner had a telephone in his house at that time, are you not? A. I do not know that.
Q. Did you try the next day to see if Mr. Warner would accept the interest? A. I did not.
Q. Can you give any explanation of Mr. Talbott's asking that question after you had refused? A. I cannot give any explanation. We got into a general discussion of the matter, and he asked me that question.
Q. Now, coming down to this equity suit which you filed against Mr. Duke, I quote paragraph 4:
"4. The defendant is the owner of the following described — of said lots 1 and 2, in said subdivision, beginning on 14th street at the northeast corner of said lot 1 and running thence south 120 feet; thence west one hundred and twenty four feet; thence south 120 feet; thence east 124 feet to the place of beginning, which parcel of land is improved by a large apartment house covering the whole of said parcel, and which building encrouches on the land owned by complainant to the extent of one inch along the southern line and five *and* one hundredths of a foot along the western line of said building, which is known as the Victoria flats? What do you mean by that? A. I mean that he was the record owner of the property?
Q. If you meant that he was the record owner of the prop-
234 erty, why didn't you say so? A. I did not draw that bill. My attorney did.
Q. You signed it didn't you? A. I stated the facts to him.
Q. You read this bill, over before you signed it, didn't you? A. Yes, sir.
Q. You knew at the time you filed that bill that Duke was not the beneficial owner of the property? A. He was the record owner.
Q. You mean the record owner? A. Yes, sir.
Q. You knew at the time you filed that bill that Duke was not the beneficial owner of that property? A. The record owner is what I meant.
Q. You also knew that he was a mere figure-head, mere empty title holder, who had no interest in the property? A. He was the record owner of that property.
Q. Didn't you know that he had no beneficial interest in the property, and had no power over it at all? A. He had no beneficial interest in the property.
Q. You knew that he had no power over that property at all, didn't you? A. I don't know any more than he had the title in it; that bill which was filed in the equity court was prepared and filed by my attorney. I stated all the facts to him. I suppose he drew the proper bill for me to sign.

Q. Paragraph 6 of said bill says:

"6. None of these constructions were made with the consent or permission of complainant. They all, seriously injure his
235 land and greatly diminish its value." Was that true? A. It looked out on it—certainly it was true.

Q. Then, why didn't you close them up? A. I didn't make any attempt to close them up.

Q. Why didn't you close them up if it injured the property? A. I have stated to you the purpose of bringing the suit, Mr. Darlington.

Q. Why didn't you close up these windows in the area-way and tear away the porches?

Mr. RIDOUT: Question objected to as it asks why the witness did not commit a trespass.

Q. I asked you, Mr. Wood, if these openings and these porches, and these area-ways, were seriously injuring your land, injurious to life, &c., why you didn't tear them away? A. I did not know that I had the power, as the mortgagee had something to say about that.

Q. You didn't sue the mortgagees? A. That bill was prepared by my attorney, Mr. Ridout, and I suppose he knew what he was doing when he prepared the bill.

Q. You came to the equity court and asked it to remove the porches and eaves, and areaways—did you want that done? A. That is what I filed the bill for.

Q. Did you want that done? A. That is why I filed the bill.

Q. But did you want that done when you filed that bill? A. At that time I did.

236 Q. I asked you, Mr. Wood, did you want that done? A. Why certainly I wanted it done.

Q. Did you want the court to make Duke do that? A. Why certainly I did; I do not see why it should not have been done.

Q. Once more—did you want that done when you filed that bill? A. I wanted that done if it could be done.

Q. Once, again—did you want that done? A. Yes, I wanted it done.

Q. Then, why didn't you do it? A. I did not think I had the power to do that.

Q. Why didn't you make Duke do that? A. Because he was the record owner of it then.

Q. Then you really did want Mr. Duke to tear away these porches or close up these windows? A. I think I have stated that I did.

Q. You state on your oath now that you wanted that thing done when you filed that bill? A. I did not care if it was done or not. I don't care if it is done now.

Q. I ask you to state if you filed that bill wishing that thing done? A. Yes, sir, I wished to have it done.

Q. Why did you wish to have it done? A. Why, because we would give public notice then where we stood in regard to the property.

Q. Why did you want that notice given? A. As I stated before Mr. Grayson had asserted that he was going to claim a portion of this adjoining land.

237 Q. He had not claimed that when this bill was filed? A. Yes, sir.

Q. Have not you sworn that he did not claim an easement until this suit was filed? A. My recollection is that he stated they were going to claim it. I do not think he used the term easement—I do not think he said that.

Q. I read from page 12 of your amended answer:

"This defendant says that no claim was ever made by any one to any such rights in respect to the ten foot strip until the filing of the bill in this cause, when it was for the first time set up in order to afford some apparent support for the contentions set forth in said bill." Do you claim that the right was asserted before the bill was filed in this case? A. The first I heard of that was when Mr. Grayson was at the Victoria flats that evening.

Q. On page 12 of your amended answer filed in this case, you state:

"12. This defendant is advised and so avers, that none of the matters and things set forth in this paragraph of the bill, created an equity in favor of the beneficiaries under either the first or second trust to any easement over the said adjacent strip of ten feet, or created any right to have said strip annexed to the building. This respondent says that no claim was ever made to any one to any such rights in respect to the said ten foot strip, until the filing of the bill in this cause, when it was for the first time set up in order to afford some apparent support for the contentions set forth in said

238 bill." In view of that, Mr. Wood, do you still claim that the right was asserted before the bill was filed in this case? A. The first that I ever heard of anything about that was when Mr. Grayson was at the hotel that evening which was just before the filing of the bill, or about the same time and then it was intimated that they were going to claim some additional ground.

Q. If you say it was before this bill was filed—why do you say in your answer that it was not heard of until after the filing of this bill? A. It was all about the same time. There was no formal claim made until that bill was filed.

Q. You say that no claim was ever made until the filing of that bill? A. I don't know that you would call that a claim.

Q. What did he say to you—I mean Mr. Grayson. A. He said he wanted to assert a claim.

Q. As a matter of fact this bill was filed to frighten away people who might have wanted to bid for the flats property is that not so? A. I told you what it was filed for.

Q. You wanted to deter people from bidding on the flats property, did you not? A. I did not have that object in view.

Q. If you were the owner of the flats property—why were you depreciating that property, and preventing an advantageous sale?

239 A. I don't know that I was depreciating it, Mr. Darlington.

Q. You don't think that taking away the windows on two

of the sides of the Victoria flats, and destroying the light and air, destroyed its chances for an advantageous sale? A. I did that for the purpose of informing everybody where I stood in the matter—that was the object.

Q. Did you think a court of equity was the proper place to go for such a purpose as that—to accomplish undisclosed purposes by pretending things that did not exist?

Mr. RIDOUT: Objected to.

Mr. DARLINGTON: I withdraw the question if counsel objects. If counsel does not object to the question I would like to have an answer.

A. I consulted an attorney and was advised to file that bill.

Q. You say that Mr. Grayson asked you whether any effort had been made to get the Warner loan extended—that loan was not due was it?

The WITNESS: Extended?

Q. Yes, sir. A. What is your question?

Q. You said that Mr. Grayson asked you whether any effort had been made to get the Warner loan extended—that loan was not due was it? A. I did not say "extended." I think that is a mistake in the short-hand notes, Mr. Darlington.

240 Q. I asked you if you saw B. H. Warner & Company between those two interviews with Mr. Grayson, and you stated: "A. Well, I would like to state right here that Mr. Grayson asked me at one of these interviews whether I had made any effort to get Mr. Warner to extend that loan." A. (After looking at the record.) I see the word "extend" is there.

Q. What did you mean to say? A. I thought that he meant to see if they would accept the interest, and withdraw the sale.

Q. To withdraw the sale? A. Yes, sir.

Q. He asked you whether you had made any effort to withdraw the sale? A. Yes, sir, the word "extended" would not be a proper word to use there.

Q. Please state what you intended to say? A. (Witness looks at the note on the record and states that what he meant to say was—whether he made an effort to have Mr. Warner withdraw the sale.

Q. Had you made an effort with Mr. Warner to withdraw the sale? A. I had not.

Q. Why did you ask Mr. Rheem not to put a sign in front of the Victoria Flats property? A. Why, because some of the people in the hotel were thinking they were going to be sold out, and got sort of uneasy, and I stated it to Mr. Rheem, and said, "Probably you had better not put the sign up."

241 Q. Why? A. I did not want to inconvenience anybody who was in the house. It was nothing to me whether they did or did not. I told Mr. Rheem so at the time.

Q. The property was going to be sold—was about to be sold? A. Yes, sir.

Q. Any reason why the public should not have had notice of it?

A. The people in the house I did not want to get uneasy—I did not want to cause them any uneasiness.

Q. You didn't want them to leave? A. No; I did not care whether they left or not.

Q. They were afraid they were going to be sold out, and to allay their uneasiness you told Mr. Rheem not to put the notice up? A. That is my recollection of it.

Q. Why did you do that—you did not want to mislead the tenants did you? A. I had no intention of misleading them, but I did not care whether they left or not.

Q. Did you think an omission to put up the notice would relieve their uneasiness of being sold out? A. Of course they would not be so apt to notice it in the papers. At the day of the sale I knew the auction flag would be put up.

Q. Did you want to have the tenants kept in the dark as to the sale? A. It was not any desire to avoid general notice—it was as I told you. Some of them were getting uneasy, and might think they had to move.

242 Q. Taking the sign down would not help them, would it? A. It was staring them in the face—that they were about to be sold out.

Q. You state in your answer that due inquiry and explanation would have shown to the persons secured by the Grayson & Heald trust—that the flats were dependent upon the adjoining ground, and a like inquiry and explanation did show Mr. Talbott and you the same thing before you bought your interest? Was such inquiry and explanation made? A. I bought additional ground to protect myself.

Q. My question is—whether such inquiry and explanation as you suggest the second trust holders should have made was made by you and Mr. Talbott, and gave notice that the flats property was dependent upon the adjoining ground for light and air. A. Yes, sir, but we procured additional ground to protect ourselves.

Q. You say in your answer, "Warner & Company were agents to collect rents—was before the Grayson & Warner trust was made. How do you know that? A. The collection of rents was placed in B. H. Warner's hands before the completion of the building.

Q. How do you know that? A. Because Mr. Haller gave me a statement from Warner & Company, and the books advertising the building issued by Warner & Company.

Q. You say in your answer that these windows, openings, projections and area-ways, were there before the Grayson &
243 Heald trust was executed—how do you know that? A. The building was completed before the trust was put on.

Q. How do you know that? A. Because I know that people were living in the building in the month of December. I think part of them were there in November. My recollection is that that trust was not put on until the latter part of December.

Q. Did Grayson & Heald, or any of the persons under the trust in which they were trustees, at that time know that the Victoria

flats were not on their own ground? A. I don't know anything about that.

Q. You say in your answer that they did—were you mistaken about that?

The WITNESS: That they knew that the flats covered the ground belonging to them?

Q. That the complainants knew when they took the Grayson & Heald trust—that the flats extended on the adjoining ground? A. I think the contractors ought to have known whether they were over or not. Mr. Grayson ought to have known that.

Q. Is that all you mean to say in answer to that question? A. Certainly that is what I mean to say.

Q. Can you tell us whether a contractor would know better than anybody else—how much ground there was, or where the line of ownership went? A. Mr. McClure, I understood, was the contractor.

They knew the dimensions of the building, and all things of
244 that sort.

Q. The lines marked on the ground where the flats were to be put? A. Yes, sir.

Q. And how did that show them that the ground upon which the improvement was to be put, did, or did not, belong to the owner of the building? A. I don't know that it showed them the ownership of the building.

NOTE.—By consent of counsel, Mr. Carusi asked the following questions *to* the witness.

By Mr. CARUSI: You stated, as far as you knew, Mr. Haller did not get any surplus from the sale of houses 1404 and 1406 Pennsylvania avenue. Do you know any more in regard to that sale than you stated in your former testimony? A. Mr. Haller was not the owner of the property at the time of the sale referred to. He had, prior to that, disposed of his interest therein for two apartment houses Nos. 302 and 304 E street northwest. He told me that he took those at the rate of $20,000. for his equity in the trade.

By Mr. DARLINGTON: All you know about that is what Mr. Haller told you, is it not? A. Yes, sir, and the fact that I deeded it to one of the parties. I deeded the Avenue property to Mr. Joseph S. Haller,

at Mr. Nicholas H. Haller's request. Mr. Haller never
245 & 246 placed the deed on record. Subsequently, Mr. Haller came to me and told me that he had made a trade which I have referred to in my previous answer, and Mr. N. T. Haller, asked me to convey the property to the party to whom he had sold, and as the deed had never been recorded I made a new deed conveying the property to Henry P. Sanders. The property on F street was conveyed to Mr. Joseph S. Haller. I think all these conveyances were made on the same day.

Q. How was the $250. paid to Mr. Haller for the grant of the McReynold's property? A. The $250. was paid by a note which he afterwards returned to me and then I gave him two notes, one for $100. and one for $150., which were subsequently paid.

FRANK I. WOOD.

Subscribed to before me this 5th day of May, A. D., 1902.

NOTE.—Testimony closed on behalf of defendants.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

* * * * * * *

247 EXHIBIT H. M. T. 1.

For and in consideration of the sum of one dollar I hereby agree to convey unto H. Maurice Talbott the whole of my interest in and to lots No. 1 and 2 of W. C. Hill's subdivision of University Park in Washington D. C. improved by the Victoria hotel and the ground around it this option to be good up to and inclusive April 1st 1899 upon the following terms

$3100. to be the price paid 1500 cash balance payable in 1 & 2 years, the sale to include all the furniture in the hotel

Witness my hand and seal this 28th day of March 1899

N. T. HALLER. [SEAL.]

248 EXHIBIT H. M. T. 2.

Rec'd. of H. Maurice Talbott the sum of thirty-one hundred dollars the same being in full for all my right, title and interest in law and in equity in and to lots No. 1 and 2 of W. C. Hill's subdivision of University Park Washington D. C. said lots being improved by the apartment house known as "The Victoria" and the ground surrounding it, together with all and singular the rights ways and appurtenances thereto belonging, and also the furniture in said hotel. And I hereby authorize and direct Frank I. Wood and Bernard A. Duke the parties in whose names the title now stands to make and execute and deliver to said H. Maurice Talbott such deeds or conveyances as may be necessary the better to carry out the above contract.

Witness my hand and seal this 1st day of April, 1899

N. T. HALLER. [SEAL.]

Witness:
BERNARD A. DUKE.

249 EXHIBIT H. M. T. 3.

$800.00. GAITHERSBURG, MD., *April 1st*, 1899.

Two years after date, I promise to pay to N. T. Haller or order, eight hundred 00/100 dollars, for value received. Negotiable and payable at —— with interest at 5 % Paid.

The First National Bank of Gaithersburg.

H. MAURICE TALBOTT.

No. —. Due ——.

(Endorsed:) N. T. Haller.

(8 2c. I. R. stamps.)

EXHIBIT H. M. T. 4.

40 int.
$800.00. $840. GAITHERSBURG, MD., *April* 1, 1899.

One year after date, I promise to pay to N. T. Haller or order, Collection.
eight hundred .....dollars, for value received. Negotiable and payable at —— with interest at 5 %

The First National Bank of Gaithersburg.

H. MAURICE TALBOTT,
Rockville, Md.

No. 97140 Due Apr. 1
3863.

(Endorsed:) N. T. Haller J. H. Meriwether [J. Sprigg Poole.]*

(8 2c. I. R. stamps.)
(3 bank stamps.)

250 EXHIBIT 5.

Office of F. W. McReynolds, attorney at law.

14" FEB., 1898.

N. T. Haller, Esq.

DEAR SIR: On behalf of C. M. Carter & Mrs. Alice S. Hill, holders of the notes secured. I desire to state that on the payment of the $4,000. due Jan. 22/98 on pts. lots 1 & 2 B. 45 University Park by March 10, 1898, the trustees will be directed to release to you the 10 ft. adjoining the Victoria on the south & west.

Yours truly, F. W. McREYNOLDS.

251 & 252 EXHIBIT T. W. No. 2.

Filed May 20, 1902.

Know all men by these presents that Alexander H. Holt and Francis A. Sebring trustees under a certain deed of trust from Nicholas T. Haller and wife dated December 28, 1897, and recorded Dec. 31, 1897, in Liber 2265 folio 254 of the land records of the District of Columbia, in consideration of one dollar, current money to them in hand paid by Frank Ivey Wood receipt whereof, before the delivery of these presents, is hereby acknowledged, have released, remised and conveyed, and do hereby release, remise, quit-claim and convey unto Frank Ivey Wood his heirs and assigns the following described land and premises, situate, lying and being in the county

[* Words enclosed in brackets erased in copy.]

of Washington, District of Columbia, and distinguished as being all of lots numbered one (1) and two (2) of block 45, of W. C. Hill's subdivision of University Park. For a fuller and complete description see trust recorded as above stated

To have and to hold the same, with appurtenances, unto and to the use of said Frank Ivey Wood, his heirs and assigns forever, fully released and discharged from the effect and operations of said deed of trust the indebtedness secured thereby having been fully paid as is evidenced by the signature of the holder of the notes.

Witness our hands and seals this eighteenth (18th) day of August, A. D. 1898.

ALEXANDER H. HOLT, *Trustee.* [SEAL.]
FRANCIS A. SEBRING, *Trustee.* [SEAL.]
BERNARD A. DUKE, *Holder of Notes.*

Signed, sealed and delivered in the presence of—
GEO. E. TERRY.

* * * * * * *

253 COMPLAINANTS' EXHIBIT RECEIPT.

Filed August 14, 1902.

WASHINGTON, D. C., *M'ch* 23/98.

Received of Nicholas T. Haller a deed of trust dated March 21, 1898, from Nicholas T. Haller *et ux.*, to Frank T. Browning and Jesse H. Wilson, trustees, to secure the payment of a note made by said Haller for the sum of $6,000.00/100 which note and trust is to be placed in bank as collateral for the payment of a note made by Frank Ivey Wood for the sum of $4,000. which amount is to be used to pay two notes of said Haller, past due, and to obtain the release of certain land from the operation of a deed of trust, dated Jan. 24, 1897, to McReynolds, and Meriwether, trustees.

FRANK IVEY WOOD.

254 EXHIBIT H'.

This indenture, made this twentieth day of December in the year of our Lord one thousand eight hundred and ninety seven, by and between Nicholas T. Haller, of the District of Columbia, and Fannie E. Haller his wife, parties of the first part, and David C. Grayson and John C. Heald, of the same place, parties of the second part:

Whereas said Nicholas T. Haller is justly indebted unto William J. McClure in the full sum of thirty thousand and eighty-seven dollars and sixty-nine cents ($30,087.69), for which amount he has made and delivered his ninety-six (96) promissory notes of even date herewith as follows: Four for the sum of seven hundred and forty-three dollars and eleven cents ($743.11) each, payable on or before two (2), three (3), four (4), and five (5) years after date re-

spectively; four (4) for the sum of one hundred and twenty dollars and twenty cents ($120.20) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of one hundred and sixty-one dollars ($161.00) each, payable on or before two (2) three (3), four (4) and five (5) years after date respectively; four (4) for the sum of one thousand one hundred and twenty-eight dollars and fifty-nine cents ($1,128.59) each, payable on or before two (2) three (3), four (4) and five (5) years after date respectively; four (4) for the sum of one hundred and twenty seven dollars and thirty-three cents ($127.33) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of seven hundred and ninety-seven dollars and twenty cents
255 ($797.20) each, payable on or before two (2), three (3) four (4), and five (5) years after date respectively; four (4) for the sum of one thousand four hundred and ninety-four dollars and ninety-one cents ($1,494.91) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of six hundred and sixty-one dollars and twenty-five cents ($661.25) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of two hundred and nine dollars and thirty-four cents ($209.34) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of one hundred and sixty-six dollars and fifty-eight cents ($166.58) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of one hundred and sixty-six dollars and twelve cents ($166.12) each, payable on or before two (2) three (3), four (4) and five (5) years after date respectively; four (4) for the sum of one hundred and sixty-three dollars and four cents ($163.04) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of ninety-nine dollars and ten cents ($99.10) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of thirty-one dollars ($31.00) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; four (4) for the sum of ninety-four dollars and sixty cents ($94.60) each, payable on or before two (2), three (3) four (4) and five (5) years after date
256 respectively; four (4) for the sum of six hundred and sixty-nine dollars and seventy-five cents ($669.75) each, payable on or before two (2), three (3) four (4) and five (5) years after date respectively; four (4) for the sum of one hundred and fifteen dollars ($115.00) each, payable on or before two (2) three (3) four (4) and five (5) years after date respectively; four (4) for the sum of seventy-five dollars ($75.00) each, payable on or before two (2), three (3), four (4), and five (5) years after date respectively; four (4) for the sum of sixty-seven dollars and thirty-eight cents ($67.38) each, payable on or before two (2), three (3), four (4), and five (5), years after date respectively; four (4) for the sum of seventy dollars ($70.00) each, payable on or before two (2) three (3), four (4), and five (5) years

after date respectively; four (4) for the sum of one hundred and fifty one dollars and fifty cents ($151.50) each, payable on or before two (2), three (3) four (4), and five (5) years after date respectively; four (4) for the sum of one hundred and twenty-one dollars and sixty-eight cents ($121.68) each, payable on or before two (2), three (3), four (4), and five (5) years after date, respectively; four (4) for the sum of twenty-eight dollars and fifty cents ($28.50) each, payable on or before two (2), three (3), four (4) and five (5) years after date respectively; and four (4) for the sum of one hundred and fifty-one dollars ($151.00) each, payable on or before two (2) three (3), four (4), and five (5) years after date respectively; all of said notes being payable to the order of said W. J. McClure, with interest at the rate of six per centum per annum until paid, payable annually.

257 And whereas said Nicholas T. Haller is also indebted unto Charles L. Frailey in the full sum of ten thousand three hundred and fifty dollars ($10,350.00) for which amount he has made and delivered his twelve (12) promissory notes of even date herewith as follows: Two for the sum of one thousand and thirty-five dollars ($1,035.00) each, and one for the sum of five hundred and seventeen dollars and fifty cents ($517.50), all payable on or before two (2) years after date; two (2) for the sum of one thousand and thirty-five dollars ($1,035.00) each, and one for the sum of five hundred and seventeen dollars and fifty cents ($517.50), all payable on or before three (3) years after date; two (2) for the sum of one thousand and thirty-five dollars ($1,035.00) each, and one for the sum of five hundred and seventeen dollars and fifty cents ($517.50) all payable on or before four (4) years after date; and two (2) for the sum of one thousand and thirty-five dollars ($1,035.00) each, and one for the sum of five hundred and seventeen dollars and fifty cents ($517.50) all payable on or before five years after date; all payable to the order of said Charles L. Frailey with interest at the rate of six per centum per annum until paid, payable annually.

And whereas, the parties of the first part, desire to secure the prompt payment of said debt, and the interest thereon, when and as the same shall become due and payable, together with all costs and expenses that may accrue ther[illegible]

258 Now, therefore, this indenture witnesseth, that the parties of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America, to them in hand paid by the parties of the second part, the receipt, of which, before the sealing and delivery of these presents. is hereby acknowledged, have given, granted, bargained and sold, aliened, enfeoffed, released and conveyed, and do by these presents give, grant, bargain and sell, alien, enfeoff, release and convey unto the parties of the second part, the survivor of them, his heirs and assigns, the following described land and premises, situate in the county of Washington, District of Columbia, known and distinguished as parts of lots one (1) and two (2) in block forty-five (45) in W. C. Hill's subdivision of the Middle Grounds of Columbian university, now called "University Park," as said subdivision is recorded in the office of the surveyor

of the District of Columbia in County Book 6, page 5, described as follows: Beginning at the northeast corner of said lot one (1), said point being also the intersection of Fourteenth street and Welling place, and running thence southerly with line of Fourteenth street one hundred and twenty (120) feet, thence westerly in a line parallel with the line of Welling place one hundred and twenty-four (124) feet, thence northerly in a line parallel with line of Fourteenth street one hundred and twenty (120) feet to Welling place, and thence easterly along the line of Welling place one hundred and twenty-four (124) feet to the beginning; together with all and singular the improvements, ways, easements, rights, privileges, and ap-
259 purtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises.

To have and to hold the said land, premises and appurtenances, unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns.

In and upon the trusts, nevertheless, hereinafter named, that is, in trust to collect the rents and profits of said building over and above the amounts necessary to pay the interest on the debt secured by the first trust upon said property, taxes, insurance, ordinary repairs, and running expenses of said building, so long as any part of the indebtedness hereby secured shall remain due and unpaid, and to apply said net rents and profits as frequently as practicable on the notes hereby secured *pro rata*, until all of said notes, and the interest thereon, and all costs and charges, shall have been paid, and when all of said notes, and the interest thereon, and all other proper costs, charges, commissions, half commissions, and expenses shall have been paid at any time prior to the sale hereinbefore provided for, to release and reconvey the said described premises unto the said Nicholas T. Haller, his heirs and assigns, at his or their cost.

And upon this further trust, that upon default or failure being made in the payment of said notes, or either of them, or upon failure of the parties of the second part to collect and divide the net rents and profits as hereinbefore provided for, for a longer period than four months, then and in that event, and at any time thereafter, to sell the said described land and premises at public
260 auction, upon such terms and conditions, at such time and place, and after such previous public advertisement as the parties of the second part, the survivor of them his heirs, or the trustee acting in the execution of this trust, shall deem advantageous and proper; and to convey the same in fee simple to, and at the cost of, the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales: first, to pay all proper costs, charges and expenses, including all taxes, general and special, due upon said land and premises, at time of sale, and to retain as compensation a commission of five per centum on the amount of the said sale or sales;

second, to pay whatever may then remain unpaid of the said notes and the interest thereon, whether the same shall be due or not, and last, to pay the remainder of said proceeds, if any there be, to said Nicholas T. Haller, his heirs or assigns.

And the said Nicholas T. Haller does hereby agree, at his own cost, during all the time wherein any part of the matter hereby secured shall be unpaid or unsettled, to keep the said improvements insured against loss by fire, in the name and to the satisfaction of the parties of the second part, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due or not; and also to pay all taxes and assessments, both general and special, that may become due on, or be assessed against, said land and premises during the continuance of this trust, and that upon any default or neglect to so insure, or pay taxes and assessments, any party secured hereby may have said improve-
261-267 ments insured and pay said taxes and assessments, and the expense thereof shall be a charge hereby secured and bear interest at the same rate as the said indebtedness hereby secured.

And it is further agreed that if the property shall be advertised for sale under the provisions of this deed and not sold, then the said trustees shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

In witness whereof, the parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

(Signed) NICHOLAS T. HALLER. [SEAL.]
FANNIE E. HALLER. [SEAL.]

Signed, sealed, and delivered in the presence of—

(Signed) R. D. HOPKINS.

DISTRICT OF COLUMBIA, *To wit:*

I, Randolph D. Hopkins, a notary public in and for the said District, do hereby certify that Nicholas T. Haller and Fannie E. Haller, his wife, who are personally well known to me as the grantors in and the persons who executed the foregoing and annexed deed, bearing date on the twentieth day of December, A. D. 1897, personally appeared before me in said District, and acknowledged the said deed to be their act and deed; and the said Fannie E. Haller being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under my hand and official seal, this twenty-eighth day of December, A. D. 1897.

(Signed) RANDOLPH D. HOPKINS,
[NOTARIAL SEAL.] *Notary Public, D. C.*

* * * * * * *

268 *Further Deposition of Frank I. Wood.*

Filed Aug. 14, 1902.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL. } No. 20773, Equity Doc. 47.

Be it known that, at an examination of witnesses, begun and held on the twenty-seventh day of June, A. D. 1902, personally appeared before me, the undersigned, an examiner in chancery, at No. 410 Fifth street northwest, in the city of Washington, in the District of Columbia, Mr. Frank I. Wood, (defendant), recalled for further cross-examination in the above-entitled cause, when and where the further deposition of said witness, hereto annexed, was by me taken down in shorthand from the oral statements of said witness, made in answer to interrogatories and cross-interrogatories propounded by counsel for the parties respectively, then and there attending, the said witness having been theretofore duly sworn according to law; that said deposition was afterwards reduced to typewriting, was read over by said witness and by him subscribed, as corrected, in my presence.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. H. FITNAM,
Examiner in Chancery.

269 In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL. } No. 20773, Equity Doc. 47.

Met Friday, June 27, 1902, at three o'clock p. m., pursuant to agreement of counsel. Present, at No. 410 Fifth street northwest, Mr. J. J. Darlington, for complainants, and Mr. Charles F. Carusi, for defendants; whereupon, Mr. Frank I. Wood (defendant) being recalled for further cross-examination, testified as follows:

Mr. FRANK I. WOOD.

By Mr. DARLINGTON:

Q. Mr. Wood, kindly look at the paper which I now hand you and state in whose handwriting it is, and by whom your name, Frank Ivey Wood, was subscribed thereto? A. (Examining paper.) Yes, sir, that is my signature.

Q. The paper is entirely in your handwriting? A. Yes, sir.

" Q. In other words, you wrote that paper and signed it? A. Yes, sir.

Q. And delivered it to Mr. Haller? A. Yes, sir.

(Mr. DARLINGTON: I offer this paper in evidence marked, "Complainants' Exhibit Receipt," which is in the words and figures following, copied into the record and here appearing:

(COMPLAINANTS' EXHIBIT RECEIPT.)

WASHINGTON, D. C., *Mch* 23/98.

Received of Nicholas T. Haller a deed of trust dated
270 March 21, 1898, from Nicholas T. Haller *et ux.*, to Frank T. Browning and Jesse H. Wilson, trustees, to secure the payment of a note made by said Haller for the sum of $6,000.00 which note and trust is to be placed in bank as collateral for the payment of a note made by Frank Ivey Wood for the sum of $4,000, which amount is to be used to pay two notes of said Haller, past due, and to obtain the release of certain land from the operation of a deed of trust, dated Jan. 24, 1897, to McReynolds and Meriwether trustees.
(Signed) FRANK IVEY WOOD.)

By Mr. CARUSI:

Q. I will ask you, Mr. Wood, to make a statement as to the circumstances under which, and surrounding which, the paper which has just been put in evidence was signed by you and delivered to Mr. Haller, as has been testified? A. At the time that receipt was given two of the two-thousand-dollar notes secured by the McReynolds trust on the land adjoining the south and west, the land occupied by the Victoria flats, was past due, and Mr. McReynolds was pressing for payment of the same. Mr. Haller sent for me and wanted me to arrange in some way to take up those two notes, he told me that McReynolds was willing to release a portion of the land—ten feet—ten feet wide; he and I talked the matter over as to the best way to arrange it, and I think he suggested that he should give a new deed of trust, if I could place it for him; I said to him I thought I could, through Mr. Talbott, in fact I was sure I could.

A deed of trust, I think, was then prepared—I forget whether
271 I prepared it or not—and I saw Mr. Talbott in regard to the matter and he told me that he could place it for me. Mr. McReynolds still contin-ed to press Mr. Haller in regard to the payment of the notes, and I told Mr. Haller that I had better take and deposit the note secured by the deed of trust, which he would give, and Mr. Talbott could use that in bank discounting my note and using Mr. Haller's note for which he gave the deed of trust as collateral until Mr. Talbott could place Mr. Haller's note for six thousand dollars. Next I wanted Mr. Haller to go with me to Mr. McReynolds and see him about it and try to stave it off a while until I could arrange it. Mr. Haller seemed averse to calling at McRey-

nolds and requested me to go, which I did. Subsequently Mr. Talbott said that as the deed of trust only covered ten feet in width, which was not sufficient upon which to erect a house, he wanted to know if I could not get more land released from the operation of the McReynolds trust, so as to include it. I told him I did not know, but Mr. Talbott wanted me to see Mr. Haller and talk the matter over and he seemed inclined to think Mr. McReynolds would be willing to release more land. Mr. Talbott and myself then went to Mr. Haller, who was at the time at the Victoria, and afterwards we saw Mr. McReynolds, talked the matter over with him, and Mr. McReynolds said that the next thing he could do would be to release twelve feet on Welling street, but would not consent to release more than ten feet on Fourteenth street. As that would only leave twenty feet front on Fourteenth street secured by that trust, Mr. Talbott said "Mr. Wood, I think that the better plan, and the best interest of the Bank of Gaithersburg would be subserved by Mr. Haller and yourself giving a joint note, which the bank
272 would discount, and use the money in taking care of these notes, the notes to be held as collateral for the payment of Mr. Haller and your joint note." That was agreed upon and then we went back to see Mr. Haller and he was perfectly willing to arrange it that way, and he gave his note, in connection with me, which was discounted by the bank. The deed of trust was then delivered to him, to Mr. Haller, that is, the deed of trust referred to as given with the six-thousand-dollar-note, was then delivered to Mr. Haller, as that plan was never carried out. But I never received the receipt back. That is, I think, all in regard to that transaction.

(Mr. DARLINTGTON: I object to so much of the answer as undertakes to contradict the written agreement between the witness and Mr. Haller.)

By Mr. DARLINGTON:

Q. Why did Mr. Haller apply to you to provide for these alleged two overdue notes? A. Because we had agreed at that time to make an exchange of properties.

Q. When did you see him, how long before this transaction? A. Just about that month, I don't know the exact date.

Q. Is it not a fact that this entire matter, viz., your acquisition of a half interest in the property, the release of the ten-foot strip from the McReynolds and Meriwether trust, and the agreement between Mr. Haller and yourself to organize a stock company to which the entire property, including the ten-foot strip, should be conveyed, were practically contemporaneous with each other?

273 (Mr. CARUSI: Question objected to, as the papers speak for themselves.)

A. I think so.

Q. Is it not a fact that this paper, introduced to-day whatever you call it, is the earliest of these three agreements?

(Mr. CARUSI: That question objected to, for the same reason.)

A. I think that it is.

Q. And it bears date, March 23, 1898, and the Duke receipt or memorandum showing that he held the title for you and Mr. Haller, dated April 5, 1898, is the last of these instruments. That was, the whole transaction lay between March 23d, 1898, and April 5, 1898, did it not? A. I think that is so.

Q. Mr. Talbott's connection with this matter dated back somewhere along there, did it not? A. Only in regard to my inducing him to place the deed of trust for me, or the notes.

Q. This paper introduced to-day, "Complainants' Exhibit Receipt," states in effect that the proceeds of that four-thousand-dollar note therein mentioned was to be used to pay off two notes of Mr. Haller, past due, and thereby to obtain a release of certain land from the operation of this deed of trust to McReynolds and Meriwether: That certain land was the ten-foot strip, was it not? A. Yes, sir.

Q. So that the agreement between you was that your note for four thousand dollars, secured by the Haller trust note of six thousand dollars, should be used to pay off the four thousand dollars due McReynolds, and the ten-foot strip should then be released?

274 A. From the operation of that trust, but subject to the six-thousand-dollar trust.

Q. And contemporaneously with that it was agreed that the whole property, that is, the Victoria flats, the ten-foot strip and all were to be conveyed to a stock company which you were to organize? A. Yes, that is true. Mr. Haller and myself were to organize the company; I stated that in my direct and cross-examinations heretofore.

Q. Let me read you something else, sworn to in your amended answer, filed September 21, 1901, in which you deny (p. 4) "that any agreement was ever entered into between the defendant Haller and the holders of the promissory notes secured by the deed of trust to McReynolds and Meriwether that, upon payment of four thousand ($4,000) dollars, the ten foot strip adjoining the building on the south and west should be released and become part of the Victoria Flats property:" Have you any explanation to make of that? A. We were simply to pay these notes, take up these two notes and carry them, that was it; they were not to be annexed to that particular building, it still left the six thousand dollar note which would be there.

Q. My trouble is this: You now admit that this release of the ten feet was to be obtained, and the ten-foot strip and the Victoria Flats property together were to be conveyed to a stock company: In your answer, which I have just read, you deny that there ever was any agreement that the ten-foot strip should be released and become a part of the Victoria Flats property. I am simply asking you to explain these apparently contradictory statements?

275 (Mr. CARUSI: Try to recall what you meant in the one case, already given in the amended answer, what it referred

to, and whether it referred to the same thing you are now asked about, and compare the two statements.

(Mr. DARLINGTON: I object to that suggestion.

(Mr. CARUSI: The witness obviously does not understand the question.

(Mr. DARLINGTON: The question is very simple.

Let the examiner read it over to the witness.

(The examiner reads to witness the following—

Question. My trouble is this: You now admit that this release of the ten feet was to be obtained, and the ten-foot strip and the Victoria Flats property together were to be conveyed to a stock company: In your answer, which I have just read, you deny that there ever was any agreement that the ten-foot strip should be released and become a part of the Victoria Flats property: I am simply asking you to explain these apparently contradictory statements? A. At the time I testified I had forgotten about the existence of this receipt, but then I didn't intend it was to be used particularly for the benefit of the building; the idea in taking those two notes, was, in placing another deed of trust and taking those two notes up, which was never carried out, and the bank took those two notes as collateral for Mr. Haller and my note, and it continues in possession, the bank does, of them today as collateral for my note.

Q. Does the fact that the collateral remains in bank explain this discrepancy between your answer and the present admitted facts, as you understand it?

(Mr. CARUSI: I object to the question, on the ground that there does not appear to be any discrepancy in the witness' state-
276 ment, and that the conclusion of his last answer was not offered as an explanation, but as a reiteration of the explanation already given.)

A. I don't know that I can say any more than I have already told in the matter.

Q. In your answer, which I will show you, it is claimed that the McReynolds agreement to release the ten-foot strip was subject to a time limit of March 10, 1898: How do you reconcile that with the fact that this exhibit "Complainants' Exhibit Receipt," introduced today, was not prepared or executed until March 23, 1898? A. That was McReynolds' agreement referred to in there, and is simply a statement that we can obtain that release; that was never carried out, the agreement you refer to, at all.

Q. Is it not a fact that on March 23, 1898, there was a then pending arrangement for the release of the ten-foot strip on the payment of four thousand dollars as set forth in this paper of March 23, 1898? A. McReynolds had expressed a willingness to do that; yes, sir.

Q. As late as March 23, 1898? A. Yes, sir.

Q. So it is not true, *it is*, that the privilege of having the strip released was terminated on March 10, 1898, as your answer seems to indicate?

(Mr. CARUSI: I object to the question, on the ground that the witness does not make the indication suggested in the question.)

A. The letter referred to is dated February the 13th; the time expired March the 10th.

277 Q. But the fact was, as shown by this letter of March 23rd, that this privilege extended beyond that, is not that so?

(Mr. CARUSI: I object again, on the ground that the question assumes that the privilege referred to was the same in the paper writing heretofore put in evidence and claimed to be an agreement on the part of McReynolds and Meriwether to release ten feet of ground and the paper which has been offered in evidence.

(Mr. DARLINGTON: Counsel for defendant would probably not attempt to make the distinction above indicated if he recalled the fact that the allegation of the bill to which this answer was filed had nothing to do with the March 10th limit and that the answer is incapable of being read in connection with the bill in any other sense than as an averment that the privilege of obtaining the ten-foot strip release terminated with March 10, 1898, and did not exist later than that date.)

A. McReynolds had expressed a willingness to release a portion of that land.

Q. When you drew this paper your understood that the proposition was still open? A. When I drew that paper I think I simply had Mr. Haller's statement; but I think I afterwards talked with Mr. McReynolds about it, and he did express a willingness to release it. There was no written agreement to that effect.

278 By Mr. CARUSI:

Q. I want to clear up one or two points. Mr. Wood, was the primary purpose of the parties to this "Complainants' Exhibit Receipt" in procuring a release of the ten-foot strip from the operation of the McReynolds and Meriwether trust to enable you and Mr. Haller to stave off Mr. McReynolds' importunities——

(Question objected to.)

—or in the alternative—he states it both ways—or was it for the ultimate purpose of leaving the ten-foot strip without any trust whatever upon it? A. Our object at that time was to take care of those notes and keep McReynolds from foreclosing; he was then pressing Mr. Haller for payment of the same; that was our object at the time.

Q. I read you a portion of the amended answer in order to fix in mind the page quoted to you previously by Mr. Darlington: "He denies that any agreement was ever entered into between the defendant Haller and the holders of the promissory notes secured by the deed of trust to McReynolds and Meriwether that, upon payment of four thousand ($4,000) dollars, the ten foot strip adjoining the building on the south and west should be released and become part of the Victoria Flats property:" Do you still make denial? A. What do you mean by becoming a part?

Q. I will put the question in another way, in order to direct your attention to the idea I have in mind: Had you any evidence at the time that that exhibit was made by you, of any agreement between the holders of the promissory notes secured by the McReynolds and Meriwether trust and Mr. Haller, that ten feet of that ground
279 should be released upon payment of four thousand dollars? A. No, sir; I had no agreement.

Q. I asked you if you had any evidence? A. No, I had not. Mr. Haller did not show me it, but he told me it could be released.

Q. Do I understand you to mean that he did not tell you he had an agreement? A. He told me he had an agreement to that effect, but he never showed it to me.

Q. He never showed it to you? A. No, sir.

By Mr. DARLINGTON:

Q. But you knew Mr. McReynolds represented the holder of these notes? A. My first impression was through Mr. Haller telling that.

Q. I want to ask you a question I omitted. Will you please produce this deed of trust from Mr. Haller and wife to Browning and Wilson mentioned in this exhibit, and file it with the examiner, to be included as part of your evidence? A. That will be impossible. My recollection is I delivered that to Mr. Haller when the purpose was not carried out.

Q. Are you positive? A. That is the best of my knowledge and belief, that I delivered it to him, and he never gave me the receipt back, I would willingly give it to you, if I had it, as I have given you other papers.

280 (Mr. DARLINGTON: But for the last answer I would not have called Mr. Haller.

(Mr. CARUSI: We will admit that Mr. Haller will testify that the paper was not so returned by him to witness.)

Q. I will ask you to make an examination and, if you find it, file it with the examiner? A. I will do so.

(Mr. CARUSI: In the beginning of the testimony I made a general objection, and I now repeat the objection, to any testimony, including this part of it, of a date subsequent to December 20, 1897, the date of the deed of trust to Grayson and Heald.

FRANK I. WOOD.

Sworn to before me as aforesaid, and subscribed, this 8th day of July, A. D., 1902.

T. H. FITNAM, *Examiner.*

281 *Depositions on Behalf of Complainants in Rebuttal.*

Filed Apr. 14, 1902.

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282 In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL.
} No. 20773, Equity Doc. 47.

Met Monday, March 24, 1902, at four o'clock p. m., No. 410 Fifth street northwest, pursuant to notice. Present, Mr. W. Cleary Sullivan, for complainants, and Messrs. Charles F. Carusi and John Ridout, for defendants; whereupon, Mr. Robert I. Fleming and Mr. James G. Hill, having each been duly sworn, testified on behalf of complainants as is hereinafter respectively set forth.

Mr. ROBERT I. FLEMING.

Direct examination.

By Mr. SULLIVAN:

Q. Please state your name? A. Robert I. Fleming.
Q. You are an architect? A. Yes, sir.
Q. How long have you practiced that profession? A. Forty years.
Q. Do you follow any special line? A. General practice. The construction of residences, offices, buildings, stores, churches, &c.
Q. Have you examined the building known as the Victoria flats, at Fourteenth and Clifton streets northwest? A. Yes, sir, I did, about four or five months ago.
Q. Will you state what would be the effect of constructing a building on the ten-foot strip right next to the Victoria flats, on
283 the south and west sides?

(Mr. CARUSI: We note an objection, on the grounds of immateriality, and irrelevance to any issue in this case; and further object that the question mentions the ten-foot strip, no such strip being shown to exist independently of the building.)

A. It would really ruin the building.
Q. In what way would it affect the building? A. It would block up the windows on the south and west sides of the building, making dark rooms.
Q. Could that effect be obviated or improved in any way by recesses? A. There are recesses on the south, and windows could be cut into one room on each side of the recess, but they would still be dark rooms. Any building constructed south or west would block up the light.
Q. Do you say that as to the south or the west? A. Both.

Cross examination.

By Mr. CARUSI:

X Q. You state if a building were erected up against the flats the Victoria Flats building would be practically ruined? A. All the rooms on these two fronts, south and west.

X Q. How high would a building have to be? A. I am assuming the whole height.

X Q. A building erected the whole height of the flats, immediately against them? A. Immediately against the flats, using that as a party wall.

284 X Q. And that would cut out the light; that is perfectly obvious? A. Yes, sir.

X Q. Have you any idea how high they are? A. No, I think they are about six or seven stories high.

X Q. And the recesses in the back and the west walls of the building, you say, would give light? A. You could cut the wall and put windows into the back rooms; but it would make them dark rooms; no direct light would be possible.

X Q. There would be no light from the sun in the building? A. No, sir. You could not get any windows on the south or west; in the front and middle rooms on the southwest corners you could get no light.

X Q. There would be only dark rooms? A. Yes, sir.

X Q. Would it relieve the situation any if there were similar recesses on the south side of the building?

(Question objected to, as immaterial, in that there are no recesses there.)

A. There is one recess on the south, in the centre of the building.

X Q. What is the character of that? A. It is of pretty good size, it lights the hall.

X Q. If the supposed building you were speaking of were erected on the adjoining parcel of ground south of the flats property, would that recess on the south of the property afford any relief? A.

285 Very little, in two rooms you could get light, but on the southwest you could not.

X Q. What is the nature of that recess? A. Just to provide light.

X Q. How large a recess? A. I suppose, six or ten feet.

X Q. Then do I understand you to say that even if a building were run up right against the south wall that two of the rooms on each floor would be lighted somewhat? A. Yes, somewhat.

X Q. But you would get some light? A. Yes, but one would not.

X Q. Suppose there were other recesses, similar to the one you have spoken of, in the west side, do you think in that event your statement made previously, about ruining the building would apply?

(Question objected to, for the same reason, immateriality.)

X Q. Do you think it would? A. You would get no sunlight through the rooms, you would just get a little light and air.

X Q. Do I understand that when you say the building would be utterly ruined, it would be because you would not get direct sunlight into the rooms? A. You could not rent the rooms, they would be all back rooms, dark rooms.

(Mr. CARUSI: We object to the latter part of that statement, about inability to rent the rooms by not having the sunlight directly coming into them.)

X Q. I understand you to say that they would be ruined, among other things, because you would not get any direct
286 sunlight? A. Yes; very little air, and no view or sunlight.

X Q. This testimony that you have given supposed that the adjoining building was flush against the south wall: Suppose a building were erected five feet away, so that there was a space of five feet between the two, what effect would that have; less than the other? A. Yes, less effect, but it would still damage the building, the flats, in the same way, cutting off your view and sunlight.

X Q. Assume that the supposititious building were erected ten feet away from the south and west walls, what effect would that have, the same thing in still greater degree? A. Yes, it would help the building very much, you would have more light and more air, but it would still damage them to some degree.

— Q. Suppose that supposed building were erected fifteen feet away, what effect would that have, so far as damaging the building goes? A. It helps the building the further you get away.

X Q. Would it at fifteen feet still damage the building? A. Very little. It cuts off only the view and part of the sunlight in the lower rooms.

X Q. All of these views that you are expressing are predicated upon the supposed structure being of the same height? A. Yes. The lower you make any building and the further you keep away from another the better it is.

X Q. I gather from your testimony, when you say the flats would be ruined, the supposition was the new building would be of
287 the height of the flats and the one would be built close up to the other? A. Yes, sir.

Redirect examination.

By Mr. SULLIVAN:

Q. You say that it would keep off the direct sunlight; did I understand you to say, in answer to a question by Mr. Carusi, about a building being flush up against the wall, that there would be any indirect sunlight? A. No, you would get daylight.

Q. How about sunlight? A. Very little, only at noonday, you might get a little, at twelve o'clock; you would get daylight.

Q. You also said something about your views as to the flats being

ruined by erecting another near it: Was that predicated upon the fact of the new building being equal in height to the present one? A. Yes.

Q. And you say a building next door to the flats, but not as high as they, would also have some effect in cutting off light? A. It would, for all rooms of the height of the roof of the new building.

Q. Suppose there was a space between the building in question and a building not so high as the flats, what would be the effect; in that case as the distance increased would it be improved proportionally as in the case of a building the same height? A. The further you get away from the flats, the better for them; if you build it up you ruin all these rooms on the south and west.

288 After Mr. James G. Hill had testified Mr. ROBERT I. FLEMING was recalled.

By Mr. CARUSI:

—Q. Mr. Fleming, do you recall whether there are recesses on the front and back? A. There are two recesses on the front and back.

X Q. How deep are they? A. Probably twenty-five feet.

X Q. What is, approximately, the width of that building west? A. The west is cut into two parts or two recesses, with two recesses for light.

X Q. About what is the width of each one of the parts, approximately? A. Of the building?

X Q. Yes, sir? A. Well, the southwest part and the northwest part are the larger, the center is smaller.

X Q. I want about what is the number of feet across for each? A. About twenty-four feet, I should say, to the center; not over.

X Q. And the other one is the same? A. The lower one.

X Q. Within these walls do you recall how many flats, or rooms there are in each part? A. They are composed of four or five rooms and a bath on each floor.

X Q. Take the center, the number in the rear, how many rooms have they? A. One room and bath.

289 X Q. And on each side of that room and bath there is—— A. A recess.

X Q. In regard to the two portions of the west side, which are larger than the middle, how many rooms are there? A. There are three or four.

X Q. Would these rooms get light from the recesses you speak of. A. They get direct light from the west, and also from the recesses; and if the new building on the west blocks out the light you would get some light from the recess.

X Q. Would that recess give any measurable degree of light? A. It would of daylight; not of sunlight.

Re-redirect examination.

By Mr. SULLIVAN:

Q. Then on a clear day how much light do you think you would get in the lower floors? A. You would not get light enough to cook by in the kitchen.

Q. How about in the morning? A. You would get light in the morning?

Q. How much of the day? A. About two-thirds of the day you would get regular light.

Q. Do you know whether the lower flats would be lighted? A. All up to the roof of the proposed new building.

ROB'T I. FLEMING.

290 Sworn to before me as aforesaid, and subscribed, this 4th day of April, A. D. 1902.

T. H. FITNAM, *Examiner.*

Mr. JAMES G. HILL.

Direct examination.

By Mr. SULLIVAN:

Q. State your name please? A. James G. Hill.

Q. And your business? A. Architect.

Q. Have you been engaged in any particular line? A. In general practice.

Q. Are you familar with the building known as the Victoria flats? A. I am not.

Q. Have you examined it? A. I have seen it in passing.

Q. You say you have seen the building, but have not examined it? A. I have not examined it.

Q. Can you state what the effect would be of constructing a building of the same size immediately next to the flats on the south and west? A. I would not express an opinion without examining the plans; if the plans were exhibited to me and a question asked as to the effect referred to, I would be glad to express an opinion.

Q. Have you heard Mr. Fleming's testimony? A. I have.

291 Q. Assuming that a building should be erected next to this building, the Victoria flats, about which Mr. Fleming has testified, with the recesses he refers to, what would be the effect upon the flats building, in your opinion? A. I do not exactly understand about the recesses. If a building were put up against the flats and had light wells where they could exist it would afford partial relief; but still that would not eradicate the injury.

Q. Suppose there were no light wells at all in the wall?

(Objected to, because there is no such case.)

Q. What would be the effect, if there were no light wells at all, of

blocking up existing windows? A. It would practically ruin the rooms in the west and south sides.

Q. Suppose a light well such as Mr. Fleming testifies to were erected, what would be the effect? A. It would injure, but not ruin.

Q. What would be the effect of cutting in the wall light wells; would it afford as much light as if no building were there? A. It would be much less.

Q. Suppose the assumed building were not of equal height; how far would that affect it? A. It would darken in porportion to the roof's height.

Q. Suppose the building were removed by some space? A. That would give also added relief.

Q. Would there be any injury if there were only a slight space between the buildings? A. Yes, if there were only a slight space.

292 Q. How much would there have to be to obviate the objection of building up against the flats? A. That is a very difficult question. I can best answer by saying the difference would be such as exists between a wide street, a narrow street and an alley.

Cross-examination.

By Mr. CARUSI:

X Q. Mr. Hill, you passed by this building, you say? A. Yes, sir.

X Q. You noticed the structure of the building, that there were two very deep wells on the Fourteenth Street front? A. I know there was a recess in front.

X Q. Perhaps Mr. Fleming can suggest. I know there are two, a well on each side. A. We don't recognize such as wells; we call that a recess.

X Q. Suppose that there were two recesses, going back twenty or twenty-five feet, how far can you say, approximately, in the event of the light being cut off or diminished on the west and south, would these recesses be supposed sufficient? A. As I remember the plans, being divided, the recess on the front would not supply any except to the front.

X Q. Then if there were similar recesses on the back that would supply the back, would it; you say this recess in front would supply the front? A. Yes, in two rooms.

X Q. If there is a similar recess in the back it would perform the same office for the back part of the building? A. Yes, sir;

293 if there were recesses there.

X Q. Do you recall from your examination of the plans whether or not there were any such recesses on the front and back of the building? A. I cannot recall.

After Mr. Robert I. Fleming, the preceding witness, had been recalled by counsel for defendants, at this stage, Mr. JAMES G. HILL, the present witness was recalled, and testified further, as follows:

By Mr. SULLIVAN:

Q. Mr. Hill, suppose a building adequately lighted by a recess has another building erected against it so as to close the light of the recess and make a well of it, the well being about four by twenty feet, and the building seven stories high, would you have to use artificial light on a clear day, in any of these stories? A. Not on the upper ones, but on the lower ones.

Q. How much of the day? A. I suppose, all day. I don't think it possible to light the lower floors of a seven story building on any kind of a day as adequately as should be.

Q. Would you have to use artificial light at all for the upper stories? A. No.

Q. In how many stories would you have to use artificial light? A. That is rather hard to say; I should say that rather more than half would be inadequately lighted.

JAS. G. HILL.

294 Sworn to before me as aforesaid, and subscribed this 5th day of April, A. D. 1902.

T. H. FITNAM, *Examiner.*

295 *Objections to Relief and Decree on Constitutional Grounds.*

Filed January 16, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON *vs.* FRANK I. WOOD ET AL. } In Equity. No. 20773.

Now come the defendants Frank I. Wood and H. Maurice Talbott and as additional objections to the relief sought by the bill and to the decree proposed to be passed herein say:—

That if said relief be granted and such decree be entered, the property of these defendants will thereby be taken from them for private use without just compensation in violation of article 5,—of the amendments to the Constitution of the United States.

JNO. RIDOUT,
Solicitor for Defendants.

296 *Affidavit of Frank I. Wood.*

Filed January 16, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON
vs.
FRANK I. WOOD ET AL. } In Equity. No. —.

Frank I. Wood, being first duly sworn says:

I am one of the defendants in this cause. I have been informed by my counsel that counsel for complainant intends to urge the appointment of Mr. David C. Grayson as one of the trustees under the proposed decree in this cause. I respectfully object to the appointment of Mr. Grayson and for grounds of such objection say,—

That the personal relations between Mr. Grayson and myself endangered by the controversy from which this cause resulted are such that it would be impossible for me to confer personally with him in respect of the many and important matters of discretion to be committed by the decree to the trustees. Mr. Grayson is an active and earnest partisan and it is my sincere belief that it will be impossible for him if appointed to discharge his responsible duties with impartiality as regards my co-defendant Talbott and myself.

FRANK I. WOOD.

Subscribed and sworn to before me this 12th. day of January, A. D. 1903.

[SEAL.] L. C. STRIDER, *J. P.*

297 & 298 *Affidavit of H. Maurice Talbott.*

Filed January 16, 1903.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL.

Now comes Henry Maurice Talbott one of the defendants in the above cause and objects to the appointment by the court of David C. Grayson as one of the trustees and for reason therefor says that the personal relations between this affiant and said Grayson are such that he the affiant would not be able to consult or advise with said Grayson.

Sworn before me Clifford H. Robertson as justice of the peace of the State of Maryland, in and for Montgomery county on this 10th day of January, 1903.

CLIFFORD H. ROBERTSON,
Justice of the Peace.

* * * * * * *

299 *Decree for Sale, &c.*

Filed January 23, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL., Trustees,
versus
FRANK I. WOOD ET AL. } No. 20773. Equity.

This cause coming on to be heard upon the pleadings and the evidence, and having been argued by the solicitors for the parties, respectively, and duly considered, it is thereupon by the court this 23rd day of January, A. D. 1903, adjudged, ordered and decreed,

1. That, as against the defendants Frank I. Wood, H. Maurice Talbott and Bernard A. Duke, their heirs and assigns, and as against the defendant Nicholas T. Haller, his heirs and assigns, other than the defendants Frederick W. McReynolds and James H. Meriwether, the property covered by the building called the Victoria flats, together with the overhanging porticos and other projections on the south and west sides of the said building, and the approaches to the entrances along the said sides of said building into the areas connected therewith, and properly appurtenant to the same, is subject to the deed of trust from the defendant Nicholas T. Haller to the defendants Brainard H. Warner and Louis D. Wine, trustees, of January 22nd, 1897, recorded in Liber 2180, at folio 340, of the land records for the District of Columbia, and, also, to the deed of trust from the said defendant Nicholas T. Haller to the com-
299½ plainant David C. Grayson and the defendant John C. Heald, trustees, of December 20th, 1897, recorded in Liber 2291, at folio 133, of the said land records, as set forth in the bill.

2. That, as against the defendants Frederick W. McReynolds and James H. Meriwether, trustees under the deed of trust from the said Haller, of the 22nd day of January, 1897, described in the bill, and as against the holders of the promissory notes secured thereby, as in the said bill set forth, and as against the said Brainard H. Warner and Louis D. Wine, trustees under the deed of trust to them, of the 22nd day of January, A. D. 1897, and as against the holders of the promissory notes secured thereby, the complainants are entitled to a decree for the sale of the said building, with all the appurtenances, as described in the preceding paragraph hereof, as claimed in the bill, for the purpose of raising the money due under the said deed of trust, and, also, the moneys due under the deed of trust to Greyson and Heald, trustees, as set forth in the bill; and that power is hereby given to the three trustees hereinafter appointed, to sell, for the purpose of raising the moneys necessary to discharge the promissory notes secured by the said deed of trust to McReynolds and Meriwether, all the residue of the lands conveyed by Alice S. Hill to N. T. Haller, as set forth in the bill, excepting the said ten foot strip, appurtenant to the said Victoria flats.

3. That Brainard H. Warner, Frederick W. McReynolds and David C. Grayson, be, and they hereby are, appointed trustees to make the said sale, and the manner of their proceedings shall
300 be as follows:

They shall first file with the clerk of this court a bond to the United States of America, executed by them with a surety or sureties approved by the court, or by one of the justices thereof, in the penalty of one hundred thousand dollars, conditioned for the faithful performance of the trust reposed in them by this decree, or which may be reposed in them by any future order or decree in the premises; and the said trustees shall first give notice by publication in the Evening Star and Washington Post newspapers, daily except Sundays and legal holidays, for ten (10) days prior to any sale hereunder, giving notice of the time, place, manner and terms of any such sale, which terms shall be as follows in respect to any sale by them, as hereinafter provided: One-third of the purchase-money in cash, one third in one (1) year and one-third in two (2) years, or all cash at the purchaser's option, the deferred payments, if any, to be represented by the promissory notes of the purchaser, bearing interest from the day of sale at the rate of five per cent. per annum, payable semi-annually, and secured by deed of trust upon the property, or the respective parcels of property to which they relate.

It is further ordered that, in making sale or sales, the trustees are authorized to advertise and sell the said property as a whole, if they shall find it expedient and advantageous so to do, and they may offer it in that form, with power to withdraw the same from sale if a sufficiently advantageous bid shall not be received for it as a whole; and if the said trustees shall find it advantageous and advisable not to sell the said property as a whole, they are authorized to
301 divide and sell the same separately; in which case they shall offer the Victoria Flats building, with a strip of land along the south and west sides thereof, ten (10) feet in width; and they shall sub-divide and offer for sale the residue of the land in such parcels as to them shall seem most advantageous and desirable, and shall sell the said parcels or so much thereof as shall be necessary to discharge the amount remaining due on the said several deeds of trust, respectively, together with the costs of the sale, and shall bring into court the proceeds thereof, subject to its further order.

It is further adjudged, ordered and decreed that, in the distribution of the proceeds of the sale or sales hereby authorized, after payment of the costs of the said sales and of this suit, there shall first be applied to the satisfaction of the notes secured by the deed of trust to the defendants McReynolds and Meriwether, such proportionate part thereof as shall represent the value of the said land exclusive of that upon which the Victoria Flats building stands, with its porticos, projections and approaches as hereinbefore set forth, and of the strip of land upon the south and west sides hereinbefore authorized to be sold with it, and, if such share or, portion of the said proceeds of sale shall be sufficient to satisfy the promissory notes secured by the said deed of trust to the defendants McReynolds and

Meriwether, any surplus thereof shall be paid to the defendants Talbott and Wood or their assigns; while if, after such application of the said above designated share or portion of the proceeds of sale, there shall remain any unpaid balance of the said last above
302 mentioned promissory notes, there shall further be applied to their payment, so far as may be necessary, such share remaining of the proceeds of sale as shall represent the value of the said ten (10) foot strip on the south and west sides of the said building over which its said porticos, projections and approaches extend or lie, and which is to be sold with it as hereinbefore provided, and the remaining proceeds of sale shall be applied, first, to the payment of the promissory notes secured by the deed of trust to the defendants Warner and Wine until they are fully satisfied, and then to the payment of the notes secured by the deed of trust to the defendants Grayson and Heald until the same shall be fully paid and satisfied, after which any surplus shall be paid to the defendants Talbott and Wood, their representatives or assigns.

4. It is further ordered that this cause be, and the same hereby is, referred to the auditor of this court, with instructions to examine such evidence as may be produced, to ascertain and report with all convenient speed what are the values, respectively, of the ground described by metes and bounds in the deed of trust to the defendants Warner and Wine and Grayson and Heald, respectively, the value of the strip of ground ten (10) feet in width along the west and south walls of the Victoria Flats building, and the value of the ground described in the deed of trust to the defendants McReynolds and Meriwether, exclusive of such strip, and that no sale here-
303 under shall be made until the auditor shall have filed his said report.

5. It is further adjudged, ordered and decreed that the complainants recover of the defendants Frank I. Wood and H. Maurice Talbott their costs in this cause, to be taxed by the clerk, and that the complainants have execution therefor as at law.

A. B. HAGNER,
Asso. Justice.

From this decree the defendants Wood, and Talbott and Duke, pray in open court an appeal to the Court of Appeals.

JOHN RIDOUT,
Solicitor for said Defendants.

304 *Motion of Defendants Wood, Talbott, and Duke for Leave to Sever on Appeal.*

Filed February 10, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL.
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

Now come the defendants Frank I. Wood, Henry Maurice Talbott, and Bernard A. Duke, and move the court for leave to sever in this appeal from their co-defendants Nicholas T. Haller, Brainard H. Warner, trustee, Louis D. Wine, trustee, Frank L. Freeman, Laura R. Gray, P. Lowe, Frederick W. McReynolds, trustee, James H. Meriwether, trustee, Alice S. Hill, Charles M. Carter, John C. Heald, trustee, Charles L. Frailey, First National Bank of Gaithersburg, and for grounds of this motion show that the interests of all said defendants are diverse and entirely separate from the interests of these defendants, who have ascertained that the said co-defendants do not nor does either of them desire to appeal.

305 *Order Granting Defendants Wood, Talbott, and Duke Leave to Sever on Appeal.*

Filed February 10, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL., Trustee-,
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

Upon consideration of the motion of the defendants Wood, Talbott and Duke, for leave to sever on their appeal from their co-defendants, it is this 10th day of February 1903, ordered that the said Wood, Talbott, and Duke, be and they are hereby granted leave to sever on their appeal from their co-defendants in this cause.

By the court:

A. B. HAGNER,
Associate Justice.

306 *Order Fixing Penalty of Appeal Bond.*

Filed February 10, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON
vs.
FRANK I. WOOD ET AL. } Equity. No. 20773.

Upon consideration of the motion of the defendants Wood, Talbott, and Duke, that the penalty of the supersedeas *and* on their appeal be fixed it is this 10th day of February, 1903, ordered that the penalty of said bond be and it hereby is fixed at ten thousand dollars.

A. B. HAGNER,
Asso. Justice.

We consent:

JESSE E. POTBURY,
Solicitor for Complainants.

Memorandum.

February 13, 1903.—Appeal bond—filed.

307 *Directions to Clerk for Preparation of Record.*

Filed March 10, 1903.

DAVID C. GRAYSON
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

The clerk will please include the following papers in the transcript of record on appeal herein—

1. Bill and Exhibits A. B. C.
2. Petition of Drew
2½. Order thereon
3. Petition of Morse Williams & Co.
3½. Order thereon
4. Answer of Wood
5. Amended answer of Wood
6. Answer of Talbott
7. Amended answer of Talbott
8. Answer of Duke
9. All depositions and exhibits.
10. Objections of defendants to relief and decree on constitutional grounds.
11. Affidavit of Wood in opposition to Grayson

12. Affidavit of Talbott in opposition to Grayson
308 13. Decree
14. Order for appeal
15. Motion for severance and to fix penalty
16. Order granting severance and fixing appeal.
17. Opinion of the court.

The clerk will please make memorandum as follows:

1899.
Sept. 28. Answers filed by Alice S. Hill
" " " Frederick W. McReynolds
Oct. 4. " " " Frank L. Freeman
" " " Laura P. Gray
" " " James P. Lowe
5. " " " Brainard H. Warner and Louis D. Wine
" " " Alice S. Hill
" " " Charles M. Carter
Dec. 11. " " " Nicholas T. Haller
1900.
Jan. 8. *Pro confesso vs.* def't Meriwether
Feb. 1. Answer filed by 1st National Bank of Gaithersburg.
May 25. Answer filed by John C. Heald
" " " Charles L. Frailey

JNO. RIDOUT,
Sol'r for Appellants.

Service of copy acknowledged March 4, 1903.
J. J. DARLINGTON,
Sol'r for Complainants.

309 *Order Extending Time to File Record.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, *et al.*
vs.
FRANK I. WOOD ET AL. } In Equity. No. 20773.

Upon consideration of the petition of the defendants Wood, Talbott and Duke, it is this 20th day of March, 1903, after hearing counsel on both sides, ordered that the time to file the transcript of record on appeal in this cause be and it is hereby extended to April 15th, 1903, upon the express condition that the said defendants shall cause said record to be printed in time to permit the cause to be heard during May, 1903, provided that the said defendants shall not accept the benefit of this extension except upon terms of consent by them to the condition upon which alone it is granted.

A. B. HAGNER,
Asso. Justice.

310 *Opinion of Justice Hagner.*

Filed Apr. 6, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, *et al.*
vs.
FRANK I. WOOD ET AL. } No. 20773. In Equity.

This cause was before the Court of Appeals on an application to reverse the order appointing receivers. The case is reported in 16 Appeals, p. 174, and seems to have been very fully argued on both sides. The appellate court declined to go into the case further than to decide that the appointment of receivers was providently made; and to affirm it. But the views of that court as to what would be the effect of the establishment by proof of the more important allegations of the bill, are set forth very decidedly in the following paragraphs of the opinion on page 184:

"The secret conveyances of the property in the parcels, as alleged; the trust deed purporting to secure an indebtedness of $34,000 that did not exist; the feigned suit with their secret trustee Duke, to abate the nuisances occasioned by the encroachment of the flats building upon the adjacent strip; the attempt to purchase the claims of the second trust for 20 per cent. of their face value; the threat made to prevent the realization of anything on their account; the manner in which they came into the possession of the rents of the flats, and their refusal to pay the surplus thereof upon the interest accruing due upon the first trust, even after Grayson had offered to advance whatever additional sum might be necessary to meet
311 the entire instalment, all tend to establish the existence of a scheme on their part to force the sale of the property, under the first trust, under such circumstances as would seriously endanger the security of the second—a scheme which it would be superfluous to characterize with an epithet."

I find the several averments thus recited have been sufficiently established by the proofs, taken since the cause was remanded.

In the next paragraph the court said:

"Whether, however, the second trust deed does in fact subject the income of the flats building to its lien, must depend upon the construction of the terms of that instrument. As it is not made an exhibit in the case, and all the information we have of its purported effect is that claimed for it in the bill, we prefer, especially on this intermediate appeal, not to rest an approval of the order appointing the receivers upon that ground."

An examination of the deed now filed as an exhibit shows that its legal effect was correctly set forth in the sixth paragraph of the bill, which is quoted on page 176, with these words of introduction:

"This instrument was not made an exhibit in the pleadings, but

the effect of an important provision thereof, together with certain proceedings thereunder, appear as follows in a paragraph of the bill."

I shall not enter upon a critical examination of the items of testimony which have led me to the conclusions thus reached, but I think they are fully justified by the proofs.

312 The first paragraph of the opinion of the Court of Appeals is also of interest as indicating its view of the importance of the question so much argued before me as to the right of the creditors under the Warner and Grayson trusts to claim an interest in a reasonable portion of the adjacent land, outside of the south and west walls of the Victoria flats. The court there says:

"The determination of the questions raised by the allegations of the bill and of the response to the rule to show cause, respecting the equitable rights, in relation to the "ten foot strip," of the beneficiaries of the second trust upon the flats property in which Grayson is trustee, will probably become a matter of very great importance in the settlement of the final decree in this litigation, and it must be deferred until that time."

The contention of Messrs. Wood and Talbott and of the Gaithersburg bank, who seem to stand alone in this position, is that the claimants under the Warner and Grayson trusts can claim no right or interest in any portion of the property purchased by Haller from Hill, lying to the south or west of the walls of the flats building; that the trustees' rights are restricted to *the lines of the grants* under which they claim; and that there is no legal support of the contention of an equitable right under any alleged contract by parol, even if proof of such contract could be found in the testimony, which they deny.

Correct as these general principles are with respect to a claim to easements urged by one proprietor over the land of an adjacent one, where no privity has existed between them resulting from

313 the ownership by one proprietor of the entire land, yet they are modified in certain cases by the existence of such privity in interest. The character of the facts in each particular case is of the utmost importance in such an inquiry. In the case at bar it is undeniable upon the proofs that the vendor, the purchaser, the lender of the monies, and the recipients of the trust notes, all felt sure the monies were to be expended upon what was to be in effect a *completed hotel.*

Under no other supposition would the several contracts have been made, the deeds executed, or the monies paid over.

It was not in contemplation that the building should be roofless.

It was clearly against their understanding that it should be without proper ventilation by windows and breathing places appropriate to the building.

And so of conveniences for communicating with the interior of the building from the south or west basements for indispensible business purposes.

When the two deeds of 22nd, January 1897, were executed, the land was perfectly bare; but when the trust to Grayson was given on 20th December, 1897, the building had been completed, with the windows, with porticoes six feet wide, and with areas opening into the hotel from the cement walks of five feet in width around its south and west sides, all outside of the lines of the first deed by Haller, and in that deed alone of all that were executed by Haller, was there an explicit mention of *the building* and of its rents; of making ordinary repairs, and of running expenses and insurance against fire &c.: all which implied the erection of a com-
314 pleted building; showing beyond doubt the positive intention of all parties that the building as completed should be dedicated to the repayment of the money to be secured by that deed.

Besides, this it is conceded the money received under that trust was especially raised to finish paying the workmen and material men whose labor and goods had enabled Haller to complete the construction of the building; and the deed also in the most extensive terms, specially conveyed all and singular the ways, easements, privileges and appurtenances connected with the improvements.

After the Warner deed was given, Haller by what must certainly have been a misunderstanding on his part of the boundaries, erected the southern and western walls of the hotel upon the outside lines of the property conveyed by that deed, for he left fifty-six openings in these walls for windows, and many doors leading to porticoes extending outside of the south walls to the width of about six feet; and many openings from areas in the southern and western walls into the hotel through those walls over cement pavements also outside of those walls; all indispensible to the customary enjoyment of an hotel and as necessary to the comfort of the occupants of the roof itself.

These openings so far as they were outside of these walls, were in and over the selvage of the ground conveyed to McReynolds and Merriweather by their trust deed of 20th January, 1897, which was recorded after the deed to Warner.

To say that Haller when he erected these overhanging porticoes and pierced the walls with windows and made the areas and porches outside the walls, had knowledge that he was going outside the lines of the hotel lot, would be to ascribe to him great stupid-
315 ity; but to charge him with an intentional purpose to cheat the men who had enabled him to erect his hotel by deliberately curtailing its usefulness and ultimate value, would be to ascribe to him an abominable fraud. His willingness to correct the blunder after it was brought to his notice, by procuring a release of the ten foot strip to the south and west, shows he deserves to be acquitted of both charges. A little more intelligent appreciation of the situation at the time by the parties interested would have resulted in carrying into effect the plan to release the strip and have avoided all the vexatious litigation since.

But in my opinion there exists no reason why the rights under the first three deeds of trust may not now be protected by this court consistently with the plain rights of the several parties.

The law governing the questions at issue with respect to the easements of the overhanging porticoes, the west entrances and the cement walks, I think is settled in the case of Frizzell *vs.* Murphy, 19 Apps. D. C. 442 &c.

Upon the principle of that case, it seems clear to me that after Haller, the owner of both properties who held at the time the equity of redemption in each, had conveyed to Grayson and Heald the land covered by the flats building to which at the time were annexed and appurtenant the overhanging porticoes and the area entrances and the cement pavements, all these apparent easements (necessary to the reasonable enjoyment of the property granted which had been and were at the time of the grant used by the owner of the entirety for the benefit of the part granted,) neither Haller nor any one claiming under him could thereafter successfully assert a claim to the contrary.

316 If this be so, then Grayson and Heald have the right when selling under their trust to include as part of the property to be sold, the right to use the several properties so appurtenant to the Victoria flats.

But although the position of Grayson and Heald is apparently more favorable in some respects than that of the Warner and the McReynolds and the Merriweather trusts, because of the fact that the building was standing upon the land when the second trust was executed and was mentioned in the deed with certain privileges connected therewith, yet inasmuch as these trusts are prior in date and the McReynolds trust is the first charge upon the ten foot strip; and more especially because all equitable considerations require that the property should be sold in such form as would best promote the interests of all parties concerned, I conceive the sale should be made under the decree of this court for the enforcement of the Warner, McReynolds and Grayson trusts all of which are overdue; under conditions that will preserve as far as possible the ability to apportion the proceeds according to the just rights of the several parties. Such decree will be in accordance with our decision which was approved in Shepheard *vs.* Pepper, 136 U. S., 626.

A. B. HAGNER,
Associate Justice.

317 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 316, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 20773, in equity, wherein David C. Grayson, trustee, *et al.* are complainants, and Frank I. Wood *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of April, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

318 In the Court of Appeals, District of Columbia.

FRANK I. WOOD ET AL., Appellants,
vs.
DAVID C. GRAYSON, Trustee, *et al.* } No. 1304.

The appellants for the purposes of section 5 of rule 6 of this court, make the following brief assignment of errors, reserving the right to more fully assign them in their brief to be filed herein on their behalf, to wit:

The court below erred.

1. In passing the decree appealed from.
2. In holding that the complainants were entitled to any easement over the "ten foot strip" described in these proceedings.
3. In holding that the trustees and beneficiaries under the trust to Warner and Wine were entitled to such easement.
4. In holding that the said ten foot strip forms part of the property conveyed by the Warner and Wine and the Grayson and Heald trusts.
5. In decreeing a sale of all the property owned by appellants, Wood and Talbott.
6. In holding that complainants are entitled to participate to any extent in the proceeds of sale of the ten foot strip.
7. In holding that the title in fee simple to the soil of the ten foot strip should be sold for the benefit of the complainants and those claiming under the Warner and Wine trusts.
8. In holding that the proceeds of sale in fee simple in the soil of such ten foot strip belong to complainants or the defendants claiming under the Warner and Wine trust.
9. In holding that the appellees are entitled to any relief whatever.

And the appellants hereby designate the following portions of the transcript of record filed herein to be printed as sufficient to
319 present all the questions raised on this appeal.

Bill, page 1.
Answer of Duke, page 47.
Amended answer, Wood, page 58.
Amended answer, Talbott, " 76.
Deposition of Grayson " 91.
Deposition of Haller " 117.
Deposition of Wood, and exhibits, thereto 127, 140, 208, 209, 247, 248, 249, 250, 251, 268.

Deposition of Talbott page 150, 162, 187, 193.
Deposition of Fleming, " 282, 283, 287.
Deposition of Hill, " 290, 292.
Objections to relief & decree, page 295.
Affidavit, Wood in opposition to Grayson, page 296.
Affidavit, Talbott in opposition to Grayson page 297.
Decree and appeal, page 299.
Motion to sever on appeal, page 304.
Severance granted, page 305.
Memorandum of appeal bond. page 306.
Directions as to transcript, page 307.
Extension of time to file transcript, page 309.
Opinion of the court, page 310.
Clerk's certificate, 317.

EUGENE CARUSI & SONS,
JOHN RIDOUT, *For Appellants.*

(Endorsed:) No. 1304. Frank I. Wood, *et al.*, appellants, *vs.* David C. Grayson, trustee. Brief statement of errors and designation by appellants of parts of record to be printed. Court of Appeals, District of Columbia. Filed Apr. 14, 1903, Robert Willett, clerk.

320 In the Court of Appeals of the District of Columbia.

FRANK I. WOOD ET AL.
vs.
DAVID C. GRAYSON, Trustee, *et al.* } No. 1304.

Counsel for appellees designates the following as additional portions of the record necessary, in his opinion, for the hearing of the appeal in the above entitled cause.

Exhibit B. at p. 25.
Exhibit C. at p. 26.
Order allowing Drew to intervene, pp. 33–4.
Order allowing Morse Williams & Company to intervene, p. 57.
Insert pp. 87 to 91, except as blue penciled.
Deposition of McClure, pp. 101–104.
Deposition of Zellers, pp. 104–106.
Deposition of Mrs. Ida V. McClure, pp. 107–108.
Pages 108–9, except as blue penciled.
Deposition of John C. Heald, pp. 109–11.
Deposition of Bernard H. Duke, 111 to 116.
Deposition of Swartzell, 119–121.
Deposition of Esher, 122–3.
Deposition of McClure recalled, 124–5.
Complainants' Exhibit Receipt, p. 253.
Exhibit No. 1., 254–261.
Page 281, except blue lines.

J. J. DARLINGTON,
Solicitor for Appellees.

April 16, '03.

Endorsed: No. 1304. Court of Appeals. David C. Grayson, *et al. vs.* Frank I. Wood. Designation of additional parts of record for printing. Court of Appeals, District of Columbia. Filed Apr. 16, 1903. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1304. Frank I. Wood *et al.*, appellants, *vs.* David C. Grayson, trustee, *et al.* Court of Appeals, District of Columbia. Filed Apr. 14, 1903. Robert Willett, clerk.

WEDNESDAY, *May* 20, *A. D.* 1903.

FRANK I. WOOD, H. MAURICE TALBOTT, and BERNARD A. Duke, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, WILLIAM J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, and Morse, Williams & Co. } No. 1304.

The argument in the above entitled cause was commenced by Mr. C. F. Carusi attorney for the appellants, and was continued by Messrs. J. E. Potbury and J. J. Darlington attorneys for the appellees, and was concluded by Mr. John Ridout attorney for the appellants.

FRANK I. WOOD, H. MAURICE TALBOTT, and BERNARD A. Duke, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, WILLIAM J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, and Morse, Williams & Co. No. 1304.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

The bill in this case was filed by the appellees, Grayson and others, against the appellants Wood, Talbott, and Duke, and others, to have appointed a receiver of what is known as the Victoria Flats property, in the city of Washington; to obtain an injunction to restrain the sale of said property; to have declared the right to certain easements alleged to be appurtenant to the said Victoria Flats building, and for the sale of that and other adjoining property, for the satisfaction and discharge of certain incumbrances thereon, and for general relief. The case has been in this court on a former appeal, taken from an interlocutory order appointing a receiver *pendente lite*, and which order was affirmed by this court. The case as then presented is reported in 16 App. D. C. 174.

The case as now presented, on pleadings and proof, is quite voluminous, but, as we apprehend the case, the material facts are plain, and about which there is little or no dispute. The most ma-

terial questions presented on this appeal are, as to the effect and operation of certain deeds of trust creating incumbrances upon the property sought to be sold, and the extent to which said deeds operate, and the right of sale of the property embraced in said deeds of trust, on the application of the complainants.

It appears by bill, answers, and proof, that, on January 13, 1897, Mrs. Alice S. Hill, being the owner, conveyed in fee to Nicholas T. Haller the whole of lots 1 and 2, in block 45, in Hill's subdivision, University Park, in the city of Washington, District of Columbia; a diagram of which lots is exhibited with the bill of complaint. These lots front 150 feet on Fourteenth street extended, and 190 feet on Welling place. They appear to have been purchased as a site for the erection of a hotel or apartment house. To enable him to effect his purpose, Haller negotiated a loan of $75,000; and on January 22, 1897, he executed a deed of trust to B. H. Warner and Louis D. Wine, as trustees, to secure said loan, on the portions of said lots embracing the north 120 feet front thereof by a depth of 124 feet. Simultaneously with said deed to Warner and Wine, Haller executed a deed of trust to the defendants McReynolds and Meriwether, as trustees, of the remaining portions of said lots 1 and 2, to secure his promissory notes aggregating the sum of $12,315, held, at the time of the institution of this suit, by Mrs. Alice S. Hill, Charles M. Carter, and, as collateral security, by the First National Bank of Gaithersburg. At the time of the making of these two mortgages or deeds of trust the lots embraced therein were entirely bare, without any improvements thereon whatever. Haller immediately afterwards proceeded to erect the apartment house known as the Victoria Flats, on the portions of the two lots described in the deed to Warner and Wine. The lines of this deed are delineated on the diagram exhibited.

In the progress of the building of the apartment house, Haller became indebted to various material men and to mechanics in the sum of $30,087.65, and in the further sum of $10,350 for money borrowed. To avoid mechanic liens upon the property, and to secure this indebtedness, he executed a second mortgage or deed of trust upon that portion of the two lots of ground embraced in the deed of trust to Warner and Wine; which said second deed of trust was made to David C. Grayson and John C. Heald, as trustees, on the 20th day of December, 1897, and was duly recorded. It is this deed that gives rise to the question, whether there was an easement created, for the benefit of the flats building, over the space of ten feet in the adjoining ground along the south and west walls of that building, to let in light and air to the doors and windows of the building on the south and west sides thereof, and to maintain the porches of the building, erected and projected over such adjoining strip or space.

In and by this deed of trust of the 20th day of December, 1897, the grant is made of the premises as then existing. The apartment building had been erected by Haller, the mortgagor, owning the

equity of redemption in both the entire lots 1 and 2; and in the south and west walls of the building he had placed a large number of windows and doors, all of which are shown to be absolutely necessary to the proper and successful use and enjoyment of the building as an apartment house; as, without such windows and doors and the light and air admitted thereto, a large portion of the building would be deprived of necessary light and air, and would be untenantable and useless.

It is also stated, and admitted in the answers of the defendants Wood and Talbott, that the walls of the building of Victoria flats extended over and encroached upon the ground embraced in the deed of trust made to McReynolds and Meriwether; and that the porches of the building on the south and west sides thereof extended out and projected over the adjoining ground covered by the deed to McReynolds and Meriwether, to the extent of about five feet; and that the areaways along the walls of the building, on the south and west sides thereof, as alleged by the bill and not denied in the answers, extend over and encroach upon the ground embraced in the trust deed to McReynolds and Meriwether to the extent of several feet. It is conceded by the appellants, that if the adjoining ground on the south and west sides of the flats building should be built upon, close up to the apartment house, the latter would be seriously damaged and reduced in value—being thereby deprived of light and air to a large portion of the building.

In the deed of trust to Grayson and Heald the parcels of the two lots as described in the deed of trust to Warner and Wine are granted, "*together with all and singular the improvements, ways, easements, rights, privileges and appurtenances* to the same *belonging, or in any wise appertaining*, and all the estate, right, title, interest and claim, either at law or in equity, or *otherwise however*, of the party of the first part, of, in, to, or out of the said land and premises." The powers and trusts are then declared, and among these are the powers to collect and apply the rents and profits of the said building over and above the amount necessary to pay the interest on the debts secured by the first deed of trust on said property,—that to Warner and Wine,—and to pay taxes, insurance, and running expenses of the building, etc. And upon default or failure being made in the payment of said notes or either of them, or upon failure of the parties of the second part to collect and divide the net rents and profits as thereinbefore provided for, for a longer period than four months, then, and in that event, and at any time thereafter, to sell the said described land and premises at public auction, etc.

Default had been made under the deed of trust to Grayson and Heald, and in the payment of the interest on the notes secured by the deed of trust to Warner and Wine; and consequently the right of sale had accrued before the time of filing the bill in this case. The first deed of trust, that to Warner and Wine, is not made an exhibit with the bill; but it is agreed that it is correctly stated in the bill of complaint.

It appears that, by arrangement, the firm of Warner and Wine were to collect the rents of the building, which were sufficient to pay all charges enumerated, including the interest on the second trust notes, until May, 1899, when the defendants, Wood and Talbott, proposed to Heald, one of the trustees in the second deed of trust, that the commissions to Warner and Wine could be saved by allowing Wood to collect the rents and apply the same as required by the trusts, to which proposition Grayson and Heald assented; and Wood from thence collected the rents, but, as charged in the bill and shown in the proof, has failed to apply or pay over the same as required. Wood was in control and conducted the affairs of the Victoria Flats building for a time, and it is said that he conducted the establishment with success. But it is averred, and testified to by Wood and Talbott, that it was found to be impossible to meet the exorbitant interest charges from the revenue; and hence the default, and the desire of Wood and Talbott to take up the notes secured by the second mortgage, by discounting them at a heavy rate, and thus reduce the mortgage indebtedness. On the other hand, it is alleged and shown in proof, that Wood and Talbott first endeavored to purchase the second trust notes at a heavy discount, and failing in that effort, they threatened that the holders of those notes should get nothing if they could prevent it; and that they thereupon made default in the first instalment of interest on the first mortgage notes falling due after Wood had undertaken the management of the property, apparently, as alleged, for the very purpose of bringing about a default and a consequent foreclosure sale of the property, to the end that they might purchase it at a reduced price, free and clear of the mortgage debts, and thus cause great loss and injury to the holders of the indebtedness. This alleged object and purpose on the part of the defendants Wood and Talbott, they have very emphatically denied, both in their answers and in their testimony as witnesses. But whether this fact be true or false, it is undeniably true that there is a large default under both deeds of trust on the Victoria Flats building, without any means of payment of either interest or principal, except by sale of the property and the application of the proceeds of the sale to the payment of the debts, according to the order and priority in which they are charged upon the property.

1. At the time of the making of the deed of trust to Warner and Wine, on the 22d of January, 1897, as we have before stated, there was no building or improvement on the ground conveyed by that deed. Nothing was conveyed but the bare ground within the limits described in the deed. But with respect to the second deed of trust, that to Grayson and Heald, made on the 20th day of December, 1897, the subject of the conveyance was in a different condition. Before the making of this latter deed, Haller, the grantor or mortgagor, had erected on the ground conveyed, the building known as the Victoria flats, an apartment house; and this building in its south and west walls had many windows and doors therein, deriving light and air from and over the adjoining property owned by the said Haller, the

mortgagor. It had also porches on the south and west sides projecting over the adjoining ground some five or six feet, and areaways in front of the doors and windows in the ground story on those sides of the building. All these constituted parts of the building, and to their use and enjoyment the light and air furnished from the adjoining open space were necessary, and without which the value of the building would be seriously impaired. Haller certainly had the right so to construct the building. The deeds of trust made by him of the several parcels of the two lots were in their nature and effect mortgages to secure debts. Hitz *v.* Jenks, 123 U. S. 298; Olcott *v.* Bynum, 17 Wall., 44. Being mortgagor, he was the real owner of the several parcels in fee. The equity of redemption is considered to be the real and beneficial estate; and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law. Except as against the mortgagee, the mortgagor, while in possession and before foreclosure, is regarded as the real owner, the mortgage or deed of trust being a mere security for debt, upon the payment of which the mortgage or deed of trust becoming extinct. And such being the right and power of Haller, the mortgagor, over the divided parcels of the two lots, it was perfectly competent to him not only to make the second deed of trust of the parcel of ground upon which the Victoria Flats building had been erected, but to create an annex to that building a *de facto* easement for light and air, and projecting porches, over the adjoining vacant ground belonging to the mortgagor, as adding security for the debts embraced by the deed of trust to Grayson and Heald; but not to the prejudice of any prior mortgage or deed of trust covering the adjoining vacant parcel of ground.

It is certainly a well settled principle, indeed not questioned, that a good title to the passage of light and air to windows may be given by grant or express agreement; and it being a well settled rule of construction that the grant of a principal thing shall be held to carry with it all that is reasonably necessary for the enjoyment of the thing granted, for the purpose for which, according to the obvious intent of the parties, the grant was made; and that a grant is always to be taken strongly against the grantor, it would appear that the right to light and air would pass upon the conveyance of the building, under the circumstances, by the grant itself, where, as in this case, light and air is apparently necessary, even without any special words of conveyance. Pomfret *v.* Ricroft, 1 Saund. 320, and notes; Blackisley *v.* Whieldon, 1 Hare, 176, 180. But, without deeming it necessary to apply the principle as thus broadly stated, the deed of trust to Grayson and Heald, by express terms, not only recognizes the existence *de facto*, but the user, of easements of ways, *rights, and privileges, as appurtenant* to the said building. This is the clear import of the deed of trust. It is true, the deed, by its terms, does not limit the extent of the right of easement of light and air over the adjoining ground on the south and west sides of the building, but

the acts and dealings with the subject by Haller, Wood, and Talbott, would clearly indicate that they found it necessary that a strip or space 10 feet wide on the south and west sides of the Victoria Flats building was reasonably necessary to supply the light and air to the rooms and apartments on those sides of the building. It is competent to arrive at the necessary extent of the space or area by what the parties have done in regard to it, and what they have recognized as reasonably necessary in actual use. Hall *v.* Lund, 1 Hurl. & Colt., 676, 683.

This case would seem to be clearly within the principle of the decision of the Supreme Court of the United States, in the case of Shepherd *v.* Pepper, 133 U. S., 626, 650. The facts in that case, as stated in the head notes of the report, are these: S. gave two deeds of trust of a lot of land in the District of Columbia to secure loans made by B. P. Afterwards he gave a deed of trust of the same lot of ground to secure a loan made by C., that deed covering also a lot in the rear of the first lot, and fronting on a side street. At the time all the deeds were given, there was a dwelling on the premises, the main part of which was on the first lot, but some of which was on the rear lot. P., on an allegation that B., a trustee in each of the first two deeds, had refused to sell the property covered by them, filed a bill asking the appointment of a trustee in the place of those appointed by the first two deeds. A new trustee was appointed and the property was sold under the first deed. S. then filed a bill to set aside the sale, and P. filed a cross-bill to confirm it. That bill was dismissed; and P. then filed a bill against S. and C., and all necessary parties to have a trustee appointed to sell the land covered by all three trust deeds, and the improvements on it; to have a receiver of the rents and profits appointed, and to have the rents and the proceeds of sale applied first to pay P. A receiver was appointed, and a decree made for the sale of the entire property, as a whole, by trustees whom the decree appointed, and for the ascertainment by the trustees of the relative values of the land covered by the first two trust deeds and the improvements thereon, and of the rear piece of land and the improvements thereon, and for the payment to P. of the net proceeds of sale representing the value of the land and improvements covered by the first two deeds, less the expenses chargeable thereto, and of the residue to C., and, out of the rents, to P. what he had paid for taxes and insurance premiums, etc. That decree was affirmed by the Supreme Court of the United States; Mr. Justice Miller dissenting upon one of the propositions involved, but which is not important to the question now under consideration.

In the opinion of the court, as delivered by Mr. Justice Blatchford, it is said: "In regard to Mrs. Gray, the letter to her, written by Mr. Brown, who was negotiating for her the loan to Shepherd, the letter being dated, etc., speaks of the loan as one 'to be secured by a second mortgage, the prior mortgage being for $45,000.' Besides this, the first two deeds of trust were recorded respectively June 3, 1874, and March 24, 1875, and they conveyed, to secure Pepper, the

premises described in them, 'together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in any wise appertaining, and all the estate, right, title, interest and claim, whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to or out of the said piece or parcel of land and premises.' The improvements and easements in question *were visibly necessary for the dwelling house as then constructed, and were visibly upon, or required for the use of, sublot A.*, as stated by Shepherd as before recited. Mrs. Gray is only a mortgagee, and not the owner in fee of sublot A; and her interest in the property is subject to the prior and subsequent interests of other parties, as those interests are usually ascertained and administered by a court of equity for the benefit of all concerned. It is not equitable that she should be allowed to use her mortgage on sublot A to prevent a sale of the entire lot 3. Her only right can be to have the proceeds of sublot A applied first to the payment of her debt, and that right is secured by the decree appealed from."

In the case of Janes *v.* Jenkins, 34 Md. 1, while some of the language employed in the opinion of the court would seem to be broader than was necessary for the decision on the facts of the case, the principle upon which the case was decided would seem to be strictly in line and accord with the principle just cited from Shepherd *v.* Pepper, *supra*. And in the recent case in this court of Frizzell *v.* Murphy, 19 App. D. C. 440, the same principle was held and applied to the state of facts quite analogous to the facts of the present case.

This principle has been very clearly stated and illustrated by Mr. Justice Story, in the case of United States *v.* Appleton, 1 Sum. C. C. Rep. 492. There a block of buildings, consisting of a central building and two wings, was erected in 1808, with a piazza in front of the central building, and side doors in the wings, which opened on and swung over the piazza, the upper parts of which were used as windows. The center building was occupied by the United States as a custom house, under a lease from 1808 to 1816, when they purchased the same in fee, and had from that time been in possession thereof. The wings, projecting beyond the front of the custom house, were sold in 1811 to other parties, and were used as stores; and it was held that those parties were entitled under the conveyance, independent of the lapse of time, to the use of the side doors and windows therein, and passage therefrom, as they were used at the time of the conveyance. That where a house or store is conveyed by the owner thereof, everything passes which belongs to, and is in use for, the house or store, as an incident or appurtenance. And after stating the well established principle in the construction of grants, and citing the authorities therefor, the learned justice said: "In truth, every grant of a thing naturally and necessarily imports a grant of it, *as it actually exists*, unless the contrary is provided for. Here, the side door in question was in actual use, as an appurtenance *de facto*, at the time of the grant. Could the owners

of the central building on the next day after the grant have shut it? Could they have shut out all the light of the windows in the upper part of it? Could they have built down to Custom House street, and filled up the piazza? In my opinion it is most clear, they could not. Their grant carried by necessary implication a right to the door and windows, and the passage, as it had been, and as it then was, used."

Doubtless, there is a diversity of judicial opinion in the American courts upon the subject of implied grant of light and air, but not where there is a clear intent, or terms of the grant, that such right should exist and be conveyed with the principal object of the grant. By the building of the Victoria flats, and the placing in the south and west walls thereof, the windows and doors, and the erection of the porches thereon, overhanging the adjoining ground of the owner of the building, was created an easement *de facto* as an appurtenant to the building, and this easement was conveyed by the deed of trust to Grayson and Heald. It is clear, we think, that Haller, after the execution of that deed, could not have closed up the doors and windows in the south and west walls of the building, or taken down the porches, without the eonsent of the trustees and parties interested in the trust of that deed; as by so doing he would have impaired the security for the debts, for which the deed was given, and thus derogated from the operation of his grant.

Recognizing the conflict of decision of the American courts, upon the subject of implied grants of light and air, Professor Washburn, in his Treatise on Easements, p. 618, has deduced a conclusion from the authorities, that would seem both just and reasonable, and which has been adopted by several of the American courts. That conclusion is, that "so far as weight of authority, both English and American, goes, it would seem that if one sell a house, the light *necessary* for the reasonable enjoyment thereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant lot would pass as incident to the dwelling-house, *because necessary to the enjoyment thereof;* but that the law would not carry the doctrine to the securing of such easement, as a mere convenience to the granted premises."

Without referring to other authorities, or making further comment, we are clearly of opinion that the deed of trust to Grayson and Heald, conveying the Victoria Flats building, carried, as a *de facto* appurtenance thereto, an easement in the ten-foot strip of land along and adjoining the south and west walls of said buildings, to admit light and air to the doors and windows in said walls, and the free use and enjoyment of the porches along said walls as part of the building.

2. It is next objected to the decree of the court below, that it adjudges and directs that, in the event that the property embraced in the several deeds of trust should not be sold in its entirety and as a whole then, the Victoria Flats building, with a strip of land along the south and west sides thereof, ten feet in width, shall be sold as

one parcel,—not the mere easement in the ten feet strip, but the corporeal estate therein, as part of the ground covered by the deeds to Warner and Wine, and to Grayson and Heald, respectively. It further directs that of the amount of purchase money representing the value of the said strip of ground, after payment of the notes secured by the deed of trust to McReynolds and Meriwether, should be applied, first, to the payment of the debts secured by the deed of trust to Warner and Wine, and, secondly, to the payment of the debts secured by the deed of trust to Grayson and Heald, to the extent required for that purpose.

In thus decreeing the sale of the ten foot strip of ground as a corporeal annex and as part of the property of the Victoria Flats building, with direction, in a certain event, to distribute any portion of the proceeds of sale of that strip to the satisfaction of the debts secured by the deed of trust to Warner and Wine, we think there was error. As we have already stated as a conceded fact, at the time of the making of the trust deed to Warner and Wine, the Victoria Flats building was not in existence, and the parts of the two lots of ground embraced in the deed are described by certain and definite limits and bounds. There was therefore nothing to which an easement by user or necessity could be appurtenant, such as is claimed in this case. It is a well settled principle, that where there is a conveyance of a specific parcel of land carved out of a larger parcel held by the grantor and described by metes and bounds, nothing which is not included within the boundaries so described passes by the deed; and therefore a right of way through the premises of the grantor does not pass. Grant *v.* Chase, 17 Mass. 443; Washb. on Eas., side p. 26. Moreover, an easement, or right in the nature of an easement, is not a right to land nor to any corporeal interest in land; and hence a grant of a right of way does not convey the soil over which the way passes to the grantee, and *a fortiori* not in the case of a grant of a mere right to light and air over a strip of ground. Goddard, Law Eas. 2. A mere easement may, without express words, pass as an incident to the princip*le* object of the grant; but it would be absurd to allow the fee or other estate in one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries. The well settled principle is, that land can not be appurtenant to land. Coke Litt. 121, *b.*; Harris *v.* Elliott, 10 Pet. 25, 53; United States *v.* Harris, 1 Sum. C. C. 21, 37. The deed of trust to Warner and Wine conveyed nothing except the ground described therein, and the building subsequently erected thereon and which became a part of the parcels of the lots conveyed. But as to the deed of trust subsequently made to Grayson and Heald, that deed not only covers the same ground and the building thereon as that embraced in the deed of trust to Warner and Wine, but also carries a right, by way of easement, to light and air over the adjoining strip of ground on the south and west sides of the Victoria Flats building, of 10 feet width, and the free use of the porches on said sides

of the building overhanging said strip of ground. There was therefore error in directing the sale of the Victoria Flats building together with the strip of ground 10 feet wide as an annex or appendant to the building,—such strip of ground not being embraced in either the deed to Warner and Wine, or that to Grayson and Heald.

3. The next objection to the decree is that it authorizes the sale of the property as a whole, that is, the entire two lots of ground, with the improvements thereon, without reference to the previous division into parcels. In this we do not perceive that there was error. It is in accordance with established practice of courts of equity, where the entire subject matter, though in separate parcels, and all the parties concerned therein, are before the court, and subject to its direction and control. As we have before stated, all the debts secured by the several deeds of trust are overdue, and the rights and interests of the parties under the several deeds of trust require the property to be sold. In the case of Shepherd *v.* Pepper, *supra*, a similar objection to that here made was made to the decree in that case. But the Supreme Court, in disposing of the objection, said: "The bill is one to obtain a decree for the sale of encumbered premises, and the application of the proceeds of sale to discharge the encumbrances according to their priority. The debts to Pepper and to Mrs. Gray are overdue; and under such circumstances a court of equity, on the application of a junior encumbrancer, will provide for the sale of the entire encumbered property, consisting of different parcels, if the circumstances of the case show that the interests of the mortgagor and of the encumbrancers require the sale;" citing many authorities for the practice. This authority, says the court, "is properly exercised in the case of deeds of trust, where all the encumbrances are due and where the plaintiff has a first lien on some of the property sought to be sold, and where all the encumbrancers are parties to the suit. Here, Pepper has a first lien on the bulk of the property sought to be sold, and a second lien, as decreed, on the small remaining portion; and the debts secured by the first two deeds of trust were all overdue when the bill in this case was filed, as well as the debt due to Mrs. Gray. Under such circumstances the mere non-assent of Mrs. Gray ought not to prevent the court from doing what is equitable in regard to the claims of Pepper, as well as those of herself." See, also, the case of Olcott *v.* Bynum, 17 Wall. 44.

The decree in the alternative provides that if the trustees should find it to be more advantageous to the interests of the parties, they should divide the property and sell the parcels thereof separately; in which case they are required to offer the Victoria Flats building part together with the strip of land along the south and west sides thereof, ten feet in width, as one part, and the residue in such parcels as they should find to be advantageous and advisable. To this we perceive no objection, except in respect to the annexation, and selling the ten-foot strip of adjoining ground together with the Victoria Flats building parcel; that direction of the

decree we have shown to be erroneous and unwarranted. If the property should be sold in its entirety, and should bring a price more than sufficient to pay costs, and expenses of sale, and all the trust debts secured by the deeds of trust, in their order of priority, in such case, there could be no difficulty in apportioning the proceeds of sale among the parties entitled thereto. In that event it would only be necessary to show by proof the value, as represented by the sale, of the flats building parcel, with and without the value of the easement added. After payment of its portion of costs and expenses, the value of the flats building parcel, without the value of the easement added, would be distributable to the payment of the debts secured by the deed of trust to Warner and Wine; and the residue of such proceeds thus produced, together with any balance of the value, as represented in the proceeds of sale, of the easement over the ten foot strip of ground, after payment of the debts secured by the deed of trust to McReynolds and Meriwether, on the parts of the lots not embraced in the deed to Warner and Wine, but embracing the ten foot strip, will be distributable to the debts and interest secured by the deed of trust to Grayson and Heald; and any balance of proceeds that may remain will be distributable to the owners of the equity of redemption in the premises sold.

But if the property decreed to be sold is not sold in its entirety, and as a whole, but in parcels, the manner of apportioning the proceeds of sale will be somewhat differently made, though not substantially variant in result from that just stated. The parcel comprising the Victoria flats, together with the easement over the ten foot strip of ground adjoining on the south and west sides of the flats building, will be sold as one parcel; and the proceeds of sale thereof, after deducting proper proportion of costs and expenses, will, less the value in such proceeds as may be shown by proof of such easement, be applicable to the payment of the debts secured by the deed of trust to Warner and Wine. The residue of the proceeds arising from the sale of that parcel, without the value of the easement ascertained by proof as aforesaid, together with whatever balance of the value of the easement so ascertained that may remain after the payment of the debts and interest secured by the deed of trust made to McReynolds and Meriwether, will be applicable to the payment of the debts and interest secured by the deed of trust to Grayson and Heald. If any balance of the proceeds of sale or sales shall remain, after thus discharging the debts and interest, in the order stated, and costs and expenses of sale, that balance will be distributable to the owners of the equity of redemption.

4. There is also some objection made to the decree because of the appointment of one of the trustees to make the sale of the property under the decree; that party being one of the complainants, and one of the trustees in a deed creating a junior encumbrance upon a part of the property. But the question of the selection and appointment of trustees to make sales under decrees, is a matter exclusively within the power and discretion of the court passing the decree, and

from whose action in respect to such appointment no power of review exists in this court.

We shall reverse the decree and remand the cause that the decree appealed from may be modified, and be made to conform to the foregoing opinion of this court. Under the circumstances of the case, we shall direct the cost of this appeal to be paid out of the fund produced by the sale of the property decreed to be sold; *and it is so ordered. Decree reversed and cause remanded.*

TUESDAY, *October 6th, A. D.* 1903.

FRANK I. WOOD, H. MAURICE TALBOTT, and Bernard A. Duke, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, and Morse, Williams & Co.

October Term, 1903.
No. 1304.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said supreme court, that the decree appealed from may be modified, and be made to conform to the opinion of this court. Costs of this appeal to be paid out of the fund produced by the sale of the property decreed to be sold.

Per MR. CHIEF JUSTICE ALVEY.

October 6, 1903.

Transcript of Record.

Court of Appeals, District of Columbia, April Term, 1904.

BRAINARD H. WARNER and LOUIS D. WINE, Trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, William J. McClure, George C. Esher, Albert S. Reavis, *et al.*
No. 1404.

H. MAURICE TALBOTT and FRANK I. WOOD, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, William J. McClure, George C. Esher, Albert S. Reavis, *et al.*
No. 1405.

Appeals from the Supreme Court of the District of Columbia.

Filed February 20, 1904.

In the Court of Appeals of the District of Columbia.

BRAINARD H. WARNER ET AL., Appellants,
vs.
DAVID C. GRAYSON ET AL. } No. 1404.

H. MAURICE TALBOTT ET AL., Appellants,
vs.
DAVID C. GRAYSON ET AL. } No. 1405.

Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee; MICHAEL Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, and Fred Drew and Morse, Williams & Company, Interveners, Complainants,
vs.
FRANK I. WOOD, H. MAURICE TALBOTT, Bernard A. Duke, Nicholas T. Haller, Brainard H. Warner, Louis D. Wine, Frank L. Freeman, Laura R. Gray, James P. Lowe, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, and The First National Bank of Gaithersburg and John C. Heald, Defendants. } No. 20773. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Separate Answer of Frank L. Freeman, Laura R. Gray, and James P. Lowe.

Filed October 4, 1899.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL.
} No. 20773, Equity Doc. 47.

The defendants Frank L. Freeman, Laura R. Gray and James P Lowe, for answer to so much and such parts of the bill of complaint in the above entitled cause as they are advised it is material for them to make answer unto, answering, say:

They admit that they are the holders of certain promissory notes secured on the Victoria Flats property by the deed of trust from the defendant Nicholas T. Haller to the defendant Brainard H. Warner and Louis D. Wine, as set forth in the bill. The defendant Frank L. Freeman is the holder of $3,500. # of the said promissory notes; the defendant Laura R. Gray holds $2,000. # of the said notes; the defendant James P. Lowe is the holder of $1,500. # of said notes, and the remainder thereof, as these defendants are informed and believe, and therefore aver, were distributed among and are held by forty-eight other persons.

These defendants are without personal knowledge of the other matters and things set forth in the bill, except they admit that default has been made in the payment of the interest on the promissory notes secured by said deed of trust, and that the property, at the time of the filing of the said bill, was advertised for sale because of such default.

And, having fully answered, they pray to be hence dismissed with their reasonable costs.

FRANK L. FREEMAN.
LAURA ROSS GRAY.
JAMES P. LOWE.

Separate Answer of the Defendants Brainard H. Warner and Louis D. Wine.

Filed October 5, 1899.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } No. 20773. Eq. 47.

These defendants, for answer to so much and such parts of the bill of complaint in the above-entitled cause, as they are advised it is material for them to make answer unto, answering, say:

1. We admit that we are the trustees under the deed of trust from Nicholas T. Haller, recorded in Liber 2180, at folio 340, of the land records of the District of Columbia, referred to in the 3rd paragraph of the bill, and conveying to us the east one hundred and twenty-four (124) feet by the width thereof, of lot one (1) and the north forty-five (45) feet by a depth of one hundred and twenty-four (124) feet, of lot two (2), in W. C. Hill's subdivision of the middle grounds of Columbian university, now called University Park, and securing thereon the one hundred and eighteen promissory notes of the said Nicholas T. Haller, aggregating seventy-five thousand dollars ($75,000.00), all dated the 22nd day of January, 1897, and payable five years after their date with interest at six per centum per annum, payable semi-annually, which notes are held by the defendants Frank L. Freeman, James P. Lowe, Laura R. Gray, and by forty eight other persons residing in the District of Columbia and in sundry other places outside of said District.

2. We believe it to be true that the Victoria Flats edifice is constructed as set forth in the bill, with windows depending upon the adjacent property for light and air, on the west and south sides, and with porches, areas, etc., extending over and upon the said adjacent property as alleged; and we believe it to be true that a ten foot strip on the west and south of said building was added to the said property by the deed from Haller to Duke, which said ten foot strip was subsequently attempted to be separated from the flats property by the deed from Duke to Wood, as set forth in the bill.

3. We admit the execution of a second deed of trust upon the Victoria Flats property by the defendant Haller to David C. Grayson and John C. Heald, with a proviso therein for the collection of the rents by the trustees under the said deed, as set forth in the bill; and we further admit that the said rents were collected by the firm of B. H. Warner & Co., which rents were first applied to payment of interest on the first encumbrance and other proper charges, and the surplus of the said rents turned over to Grayson and Heald, trustees, for application on the interest of the second trust notes, as

alleged, and that subsequently, to wit, on or about the month of May, 1899, the collection of the said rents was taken out of the hands of B. H. Warner & Co., and assumed by the defendant Wood, since which time no interest has been paid upon the first encumbrance, but default in the payment of said interest has been permitted to arise, and the said property was advertised for sale under the first trust because of such default, as is alleged in the bill, which sale was prevented by the proceedings in this cause.

DISTRICT OF COLUMBIA, *ss:*

We, Brainard H. Warner and Louis D. Wine, on oath say that we have read the foregoing answer by us subscribed, and know the contents thereof; that the matters and things therein set forth as of our own personal knowledge are true, and that those set forth on information and belief we believe to be true.

BRAINARD H. WARNER.
LOUIS D. WINE.

Subscribed and sworn to before me this fourth (4th) day of October, A. D. 1899.

[SEAL.] HENRY J. GROSS,
Notary Public.

Stipulation of Facts, &c.

Filed November 30, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } No. 20773. Equity.

The court desiring to be further advised as to the physical conditions tending to determine whether or not an easement over the cement walk on the south and west sides of the Victoria Flats building is essential to an advantageous sale thereof, and in order to avoid the delay of a reference to take testimony in respect thereto, it is hereby stipulated as follows:

1. The areaways on the west and south sides mentioned by the witness William J. McClure consist of excavations from the surface of the ground downwards, projecting into the cement walk, and protected by wooden platforms, on grade with and forming part of the said walk, and provided with interstices or openings admitting light to the windows below.

2. On the south side of the building there is one door-way or entrance, and, on the west side, four door-ways or entrances, opening

out upon the said cement walk, and not otherwise accessible from the exterior of said building.

3. On the said west wall, projecting out upon the said cement walk, there are three garbage chutes, for collection of garbage from the building, and two openings into the cellar, through which the coal supply of the building is received, the said garbage chutes and coal cellars being accessible from the exterior only by means of the said cement walk.

In conceding the physical facts to be as above set forth, the defendants Duke, Wood and Talbott object to the competency or admissibility thereof into the record at this stage of the case, and the foregoing stipulation of facts is made subject to their said objection and exception.

J. J. DARLINGTON,
Sol. for Complainants.
JOHN RIDOUT,
Sol. for Wood, Talbott, and Duke.

Modified Decree for Sale.

Filed November 30, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL., Trustees,
vs.
FRANK I. WOOD ET AL. } No. 20773. Equity.

Pursuant to the mandate of the Court of Appeals herein filed, it is by the court this 30th day of November, A. D. 1903, adjudged, ordered and decreed that the decree of this court passed in the above entitled cause on the 23rd day of January, A. D. 1903, be, and the same hereby is, modified as follows:

1. That the property described in the deed of trust from the defendant Nicholas T. Haller to the defendants Brainard H. Warner and Louis D. Wine, trustees, bearing date the 22nd day of January, 1897, and recorded in Liber 2180, at folio 340, of the land records for the District of Columbia, is subject to the said deed of trust as the first lien or incumbrance thereon; and that, as against the defendants Frank I. Wood, H. Maurice Talbott and Bernard A. Duke, their heirs and assigns, and as against the defendant Nicholas T. Haller, his heirs and assigns other than the defendants Frederick W. McReynolds and James H. Meriwether, the said described property, together with an easement over a strip of ground ten (10) feet in width extending along the entire west and south sides of the said described parcel of ground, for purposes of light and air, and of the free use of the overhanging porticos and other projections on the south and west sides of the Victoria Flats building, and the ap-

proaches to the entrances along the said sides of said building referred to in the pleading as a cement walk along the said south and west sides thereof, is subject to the deed of trust from the said defendant Nicholas T. Haller to the complainant David C. Grayson and the defendant John C. Heald, trustees, bearing date of December 20th, 1897, and recorded in Liber 2291, folio 133, of the land records of the District of Columbia as set forth in the bill.

2. That, as against the defendants Frederick W. McReynolds and James H. Meriwether, trustees under the deed of trust from the said Nicholas T. Haller, bearing date the 22nd day of January, 1897, as described in the bill, and as against the holders of the promissory notes secured thereby, as above set forth, and as against the said Brainard H. Warner and Louis D. Wine, trustees under the deed of trust to them of the 22nd day of January, 1897, and as against the holders of the promissory notes secured by the said deeds of trust, the complainants are entitled to a decree for sale of the said building, with all the easements and appurtenances as described in preceding paragraph hereof, for the purpose of raising the money due under said deeds of trust; and that power is hereby given to the three trustees, hereinafter appointed, to sell, for the purposes of raising the moneys necessary to discharge the promissory notes secured by the said deed of trust to McReynolds and Meriwether, all the residue of the lands conveyed by Alice S. Hill to Nicholas T. Haller, as set forth in the bill, subject to the easements over the ten (10) foot strip appurtenant to the said Victoria Flats property, as provided in the preceding paragraph of this decree.

3. That Brainard H. Warner, Frederick W. McReynolds and David C. Grayson be, and they hereby are, appointed trustees to make the said sale, and the manner of their proceedings shall be as follows:

They shall first file with the clerk of this court a bond to the United States of America, executed by them with a surety or sureties approved by the court, or by one of the justices thereof, in the penalty of one hundred thousand dollars ($100,000.00) conditioned for the faithful performance of the trusts reposed in them by this decree, or which may be reposed in them by any future order or decree in the premises; and the said trustees shall first give notice by publication in the Evening Star and the Washington Post newspapers, daily except Sundays, for ten days prior to any sale hereunder, giving notice of the time, place, manner and terms of any such sale, which terms shall be as follows in respect to any sale made by them, as hereinafter provided: One-third of the purchase money in cash, one-third in one year and one-third in two years, or all cash at the purchaser's option, the deferred payments, if any, to be represented by the promissory notes of the purchaser, bearing interest from the day of sale, at the rate of 5 % per annum, payable semi-annually, and secured by deed of trust upon the property, or the respective parcels of property, to which they relate. It is

further ordered that, in making sale or sales, the trustees are authorized to advertise and sell the said property as a whole, if they shall find it expedient and advantageous so to do, and they may offer it in that form with power to withdraw the same from sale if a sufficiently advantageous bid shall not be received for it as a whole; and if the said trustees shall find it advantageous and advisable not to sell the said property as a whole, they are authorized to divide and sell the same separately, in which case they shall offer the Victoria Flats building, with the easements as set forth in the first paragraph of this decree over the adjacent strip of ground, ten (10) feet in width, along the south and west sides of the parcel of ground described in the deed of trust to Warner and Wine of January 22nd, 1897, hereinbefore referred to; and they shall subdivide and offer for sale the residue of the lands in such parcels as to them shall seem most advantageous and desirable, and shall sell the said parcels, or so much thereof as shall be necessary to discharge the amounts remaining due under the said several deeds of trust respectively, together with the costs of the sale, and shall bring into the court the proceeds thereof subject to its further order. It is further adjudged, ordered and decreed that if the said property shall be sold in its entirety, the value of the Victoria Flats Building parcel, without the value of the easements, after payment of its portion of the costs and expenses, including the costs of this suit and the costs of the cause in the Court of Appeals, shall be applied to the payment of the debts secured by the deed of trust to Warner and Wine, and the residue of such proceeds thus produced, together with any balance of the value, as represented in the proceeds of sale, of the easements over the ten (10) foot strip of ground, after payment of the debts secured by the deed of trust to McReynolds and Meriwether on the parts of lots not embraced in the deed to Warner and Wine, but embracing the ten (10) foot strip, shall be distributable to the debts and interest secured by the deed of trust to Grayson and Heald, and any balance of proceeds that may remain shall be distributable to the owners of the equity of redemption in the premises sold. But if the said property is not sold in its entirety, but in parcels, then the parcel comprising the Victoria flats, together with the easements over the ten (10) foot strip of ground adjoining on the south and west sides thereof, shall be sold as one parcel, and the proceeds of sale thereof, after deducting its proper proportion of the said costs and expenses, including the costs of this suit and of the cause in the Court of Appeals, shall, less the value in such proceeds, of such easements, as may be shown by proof, be applicable to the payment of the debts secured by the deed of trust to Warner and Wine, the residue of the proceeds arising from the sale of the said parcel, without the value of the easements, together with whatever balance of the value of the easements that may remain after the payment of the debts and interest secured by the deed of trust to McReynolds and Meriwether, shall be applicable to the payment of the debts and interest secured by the deed of trust to Grayson

and Heald, and any balance of the proceeds of sale or sales which shall remain after thus discharging the costs and expenses of the sale and suit, and the debts and interest in the order stated, shall be distributable to the owners of the equity of redemption;—the value of the flats building without the easements, and the value of the easements, as represented in the proceeds of sale, to be ascertained by proofs in such manner as the court may direct, upon the coming in of the report of such sale or sales.

4. It is further ordered, adjudged and decreed that the complainants recover of the defendants Frank I. Wood and H. Maurice Talbott their costs in this suit, to be taxed by the clerk, and that the complainants have execution thereof as at law.

ASHLEY M. GOULD, *Justice.*

Order Granting an Appeal.

Filed December 8, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL., Trustees,
vs.
FRANK I. WOOD ET AL. } Equity. No. 20773.

Upon motion of Brainard H. Warner and Louis D. Wine, trustees, and Frank L. Freeman, Laura R. Gray and James P. Lowe, by B. W. Parker, their attorney, it is this 8th day of December, 1903, ordered that an appeal be granted the said defendants to the Court of Appeals from so much and such parts of the final decree passed herein on the 30th day of November 1903, as adjudicates that the deed of trust from Nicholas T. Haller to Brainard H. Warner and Louis D. Wine, trustees, is not a prior and first lien upon the easements in and over a strip of ground adjoining the land described in said deed of trust, to wit, a strip of ground ten (10) feet in width extending along the entire west and south sides of the said described parcel of ground, for purposes of light and air and of the free use of the overhanging porticos and other projections on the south and west sides of the Victoria Flats building, and the approaches to the entrances along the said sides of said building referred to in the pleadings as a cement walk along the said south and west sides thereof; and the bond for costs to be given by said defendant is fixed at one hundred dollars.

ASHLEY M. GOULD, *Justice.*

Order to Issue Citation.

Filed December 16, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } Equity. No. 20773.

To the clerk of the supreme court of the District of Columbia:

Brainard H. Warner and Louis D. Wine, trustees; and Frank L. Freeman, Laura R. Gray and James P. Lowe having appealed to the Court of Appeals from a part of the final decree passed herein on the 30th day of November, 1903, the clerk of the court will please issue a citation directed to the following named persons as appellees:

David C. Grayson, trustee; Michael Shea; William J. McClure; George C. Esher; Albert S. Reavis; David C. Grayson; Calvin Cain; Thomas R. Riley; George H. Zellers; John E. Sheckells; Edward J. Hannan; Charles A. Muddiman; Frederick W. Buddecke; John R. Galloway; Charles Ernest; Daniel A. Donnelly; John M. Pruett; Fred Drew; Morse, Williams & Co., a corporation; Frank I. Wood, H. Maurice Talbott; Bernard A. Duke; Nicholas T. Haller; Frederick W. McReynolds; James H. Meriwether; Alice S. Hill; Charles M. Carter; Charles L. Frailey; The First National Bank of Gaithersburg; and John C. Heald.

B. W. PARKER,
Att'y for Appellants.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } No. 20773. In Equity.

The President of the United States to David C. Grayson, trustee; Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Seliers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, Morse, Williams & Co., a corporation; Frank I. Wood, H. Maurice Talbott, Bernard A. Duke, Nicholas T. Haller, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, The First National Bank of Gaithersburg, and John C. Heald, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause

therein, under and as directed by the rules of said court, pursuant to an appeal allowed in the supreme court of the District of Columbia, on the 8th day of December, 1903, wherein Brainard H. Warner and Louis D. Wine, trustees; and Frank L. Freeman, Laura R. Gray and James P. Lowe, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Harry M. Clabaugh, chief justice of the supreme court of the District of Columbia, this 14th day of December, in the year of our Lord one thousand nine hundred and three.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 14th day of Dec., 1903.

JNO. RIDOUT,
For Talbott, Wood, & 1st Nat'l Bank of Gaithersburg.
J. H. MERIWETHER.
NICHOLAS T. HALLER.

Dec. 18.

J. J. DARLINGTON,
Sol. for Complainants.
J. C. HEALD,
Sol'r for Self & Chas. L. Frailey.
F. W. McREYNOLDS,
Sol'r for Alice S. Hill & Chas. M. Carter & Self.

(Endorsed:) No. 20773. Equity. David C. Grayson, trustee, *et al. vs.* Frank I. Wood, *et al.* Citation. Issued Dec. 14", 1903. Ret'd Dec. 30, 1903. Served copy of the within citation on within named Bernard A. Duke, Dec. 30, 1903. Aulick Palmer, marshal. B.

Order.

Filed December 21, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL.
} Equity. Number 20773.

On motion of the defendants H. Maurice Talbott and Frank I. Wood, it is this 21st day of December, 1903, ordered that the said defendants have leave to sever from their co-defendants on the appeal taken by the said first mentioned defendants from the decree passed herein on the 30th day of November, A. D. 1903, and

It is further ordered that the penalty of the bond on said appeal to operate as a supersedeas is fixed at ten thousand dollars.

ASHLEY M. GOULD, *Justice.*

Order for Appeal.

Filed December 21, 1903.

In the Supreme Court of the District of Columbia, the 18th Day of December, 1903.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } Equity. Number 20773.

The clerk will enter an appeal in this cause by H. Maurice Talbott and Frank I. Wood, from the decree passed herein on the 30th day of November, 1903.

JNO. RIDOUT,
Solicitor for Defendants.

Order for Citation.

Filed December 21, 1903.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } In Equity. Number 20773.

The clerk will please issue citation on behalf of the defendants H. Maurice Talbott and Frank I. Wood, appellants on their appeal from the decree herein of November 30th, 1903 against (David C. Grayson, trustee, Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew and Morse Williams and Company, a corporation).

JNO. RIDOUT,
Solicitor for Wood and Talbott.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL.
} No. 20773. In Equity.

The President of the United States to David C. Grayson, trustee; Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, and Morse Williams and Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia, on the 21 day of December, 1903, wherein H. Maurice Talbott and Frank I. Wood are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable *Edward F. Bingham*, chief justice of the supreme court of the District of Columbia, this 21st day of December in the year of our Lord one thousand nine hundred and three.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 23 day of December, 1903.

J. J. DARLINGTON,
Attorney for Appellees Other than Drew & Morse, Williams and Company.
MACKALL & MAEDEL,
Att'ys for Morse, Williams & Co.

JESSE E. POTBURY,
Sol. for Fred Drew.

(Endorsed:) No. 20773 Equity. David C. Grayson, trustee, *et al. vs.* Frank I. Wood *et al.* Citation. Issued Dec. 21, 1903 Served cop- of the within citation on ——— ———. ——— ———, marshal. John Ridout, attorney for appellant-.

Memoranda.

December 22, 1903.—Appeal bond of Frank I. Wood and H. Maurice Talbott, filed.

December 26, 1903.—Appeal bond of Brainard H. Warner, Louis D. Wine, Frank L. Freeman, Laura R. Gray and James P. Lowe, filed.

Order.

Filed January 6, 1904.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON ET AL., Trustees, Complainants,
vs.
FRANK I. WOOD ET AL., Defendants. } Equity. No. 20773.

On motion of the defendants, Brainard H. Warner, Louis D. Wine, Frank L. Freeman, Laura R. Gray and James P. Lowe, it is this 6th day of January, 1904, ordered that the said defendants have leave to sever from their co-defendants in the appeal taken by them on the 8th day of December 1903, from the decree passed herein on the 30th day of November, A. D., 1903.

ASHLEY M. GOULD, *Justice.*

Extension of Time to File Transcript.

Filed Feb. 5, 1904.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } Equity. Number 20773.

On motion of the defendants, Frank I. Wood and H. Maurice Talbott, it is this 5th day of February, A. D. 1904, ordered that the time to produce and file the transcript of record on the appeal of said defendants from the decree passed herein November 30th, A. D., 1903, be, and it is hereby extended until, and including, February 20th, 1904.

ASHLEY M. GOULD, *Justice.*

Extension of Time to File Transcript.

Filed Feb. 5, 1904.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } Equity. No. 20773.

On motion of the solicitor for B. H. Warner and Louis D. Wine, trustees, Frank L. Freeman, Laura R. Gray and James P. Lowe, it is this 5th day of February 1904, ordered that the time in which they may file the record of their appeal in the Court of Appeals of this District, be, and the same is hereby, extended to the 20th of February, 1904.

ASHLEY M. GOULD, *Justice.*

Agreed to:
J. J. DARLINGTON,
For Compl'ts.

Directions to Clerk for Preparation of Record.

Filed February 12, 1904.

In the Supreme Court of the District of Columbia.

DAVID C. GRAYSON, Trustee, ET AL.
vs.
FRANK I. WOOD ET AL. } Equity. No. 20773.

In this cause it is stipulated that the appeal from the decree passed herein December 31st, 1903, shall be heard upon the transcript of record already filed in cause numbered 1304 in the Court of Appeals of the District of Columbia, together with the following additional record, to wit:

1. The answers to the original bill of Brainard H. Warner and Louis D. Wine, Frank L. Freeman, Laura R. Gray and Jas. P. Lowe.
2. The stipulation filed November 30th, 1903.
3. The decree passed November 30th, 1903.
4. The entry of appeals by the respective appellants.
5. The orders of severance.
6. The memorandum of the appeal bonds.

It is further stipulated that the only transcript to be made on this appeal by the clerk of the supreme court of the District of Columbia shall be the papers enumerated as constituting the above-mentioned additional record, and at the hearing of this appeal, the said

transcript filed in said cause numbered 1304, shall be used with the same force and effect as if the same were actually re-copied and filed as part of the record of these appeals.

J. J. DARLINGTON,
Sol. for Complainants.
JNO. RIDOUT,
Sol. for Wood & Talbott.
B. W. PARKER,
Sol. for Warner, Wine, Freeman, Lowe, & Gray.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 25, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 20,773, in equity, wherein David C. Grayson *et al.* are complainants, and Frank I. Wood *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 20th day of February, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1404. Brainard H. Warner *et al.*, appellants, *vs.* David C. Grayson *et al.* No. 1405. H. Maurice Talbott *et al.*, appellants, *vs.* David C. Grayson *et al.* Court of Appeals, District of Columbia. Filed Feb. 20, 1904. Henry W. Hodges, clerk.

FRIDAY, *May 6th, A. D.* 1904.

BRAINARD H. WARNER and LOUIS D. WINE, Trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, William J. McClure, George C. Esher, Albert S. Reavis, *et al.*, } No. 1404.

and

H. MAURICE TALBOTT and FRANK I. WOOD, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, William J. McClure, George C. Esher, Albert S. Reavis *et al.* } No. 1405.

The above entitled causes were submitted to the consideration of the court on the printed record and briefs filed herein by Mrssrs. C. C. Cole and B. W. Parker attorneys for the appellants in No. 1404, and by Messrs. John Ridout, J. J. Darlington and C. F. Carusi, attorneys for the appellees in No. 1404; and by Mr. John Ridout and C. F. Carusi attorneys for the appellants in No. 1405, and by Mr. J. J. Darlington, attorney for the appellees in No. 1405.

On motion counsel for the appellants in Nos. 1404 and 1405, and counsel for the appellees in No. 1404, are allowed until Tuesday next to file briefs herein, with leave to counsel for appellees to file reply briefs if so advised.

In the Court of Appeals of the District of Columbia, April Term, 1904.

BRAINARD H. WARNER ET AL.
vs.
DAVID C. GRAYSON, Trustee, ET AL., } No. 1404.

and

H. MAURICE TALBOTT
vs.
DAVID C. GRAYSON, Trustee, ET AL. } No. 1405.

Stipulation.

It is hereby stipulated by and between the counsel for Warner and Wine *et al.*, appellants, and Grayson *et al.*, appellees that the following language, to wit: "together with all and singular the improvements, ways, easements, rights, privileges, and appurtenances

to the same belonging, or in anywise appertaining and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises.

"To have and to hold the said land, premises and appurtenances, unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns," is used in the deed from Nicholas T. Haller to Brainard H. Warner and Louis D. Wine, trustees, referred to in the original bill in said causes as recorded in Liber No. 2180 at folio No. 340 of the land records of the District of Columbia.

And it is further agreed that the stipulation may be used at any future hearing in this cause in lieu of a copy of said deed.

B. W. PARKER,
Sol. for Warner and Wine et al.

J. J. DARLINGTON,
Sol. for Grayson et al., Appellees.

(Endorsed:) Nos. 1404, 1405. Warner *et al. vs.* Grayson *et al.* Talbott *et al. vs.* Grayson *et al.* Stipulation of counsel. Court of Appeals, District of Columbia. Filed May 16, 1904. Henry W. Hodges, clerk.

BRAINARD H. WARNER and LOUIS D. WINE, Trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, William J. McClure, George C. Esher, Albert S. Reavis, *et al.* } No. 1404.

H. MAURICE TALBOTT and FRANK I. WOOD, Appellants,
vs.
DAVID C. GRAYSON, Trustee, MICHAEL SHEA, William J. McClure, George C. Esher, Albert S. Reavis, *et al.* } No. 1405.

(Mr. Justice SHEPARD delivered the opinion of the court:)

Opinion.

These are separate appeals from the same final decree. All of the parties with their several interests were before the court on a former appeal in the common cause, and these appeals have been prosecuted from the final decree entered therein on the mandate of this court. See Wood *v.* Grayson, 31 W. L. R., 663.

On that appeal it was determined that as regards the trust deed under which Warner and others, appellants in No. 1404, claimed,

there was no lien upon the strip of land used in connection with the building, and, therefore, so much of the decree as recognized any right thereunder in them was declared erroneous. As regards the trust deed under which Grayson and others, appellees in No. 1405, as well as in No. 1404, claimed, the opinion recites that the same conveying the building and lot "carried as a *de facto* appurtenance thereto an easement in the 10-foot strip of land along and adjoining the south and west walls of said buildings, to admit light and air to the doors and windows in said walls, and the free use and enjoyment of the porches along said wall as part of the building." The decree having been reversed the cause was remanded that the same might "be modified and be made to conform to the foregoing opinion of this court."

Upon receipt of the mandate, the appellants, Talbott and others, contended that the easement ordered to be sold should be limited to the very language of the opinion as heretofore quoted, namely, to the admission of light and air to the doors and windows in the south and west walls and to the free use and enjoyment of the porches along said walls as part of the building. Grayson and others asking to have the description of the easement made more precise in the final decree, submitted a stipulation signed by the opposing parties with reservation of objections to competency, showing the following facts:

"1. The areaways on the west and south sides mentioned by the witness William J. McClure consist of excavations from the surface of the ground downwards, projecting into the cement walk, and protected by wooden platforms, on grade with and forming part of the said walk, and provided with interstices or openings admitting light to the windows below.

"2. On the south side of the building there is one doorway or entrance, and, on the west side, four doorways or entrances, opening out upon the said cement walk, and not otherwise accessible from the exterior of said building.

"3. On the said west wall, projecting out upon the said cement walk, there are three garbage chutes, for collection of garbage from the building, and two openings into the cellar, through which the coal supply of the building is received, the said garbage chutes and coal cellars being accessible from the exterior only by means of the said cement walk."

It is not denied that all of the foregoing facts are founded upon the allegations of the bill and answers.

The court concluding that "the approaches to the entrances along the said sides of the Victoria Flats building, and the approaches to the entrances along the said sides of said building referred to in the pleading as a cement walk along the south and west sides thereof," were part of the easement subject to the deed of trust securing Grayson and others, included them in the final decree establishing said lien and ordering sale thereunder.

1. So much of the decree entered by the trial court as denies the

extension of the lien of the trust deed of Warner and Wine (appellants in No. 1404), to the easement in the "ten-foot strip," is in direct accordance with the mandate directed to it. The question was directly involved in the record before this court, and was expressly decided. Its decree could not be varied or examined for any other purpose than execution. *In re* Sanford Tool & Fork Co., 160 U. S. 247, 255; *In re* Potts, 166 U. S., 263.

This is conceded by the appellants, but they claim the right to appeal and reopen the question in this court. Their appeal is in substance nothing more than a belated petition for rehearing, and cannot be entertained. The former decision has become the settled law of the case not only for the trial court but for this court also. Thompson *v.* Maxwell Land Grant Co., 168 U. S., 451, 456; Holcomb *v.* Dearing, 8 App. D. C., 298, 301.

2. The question whether so much of the decree as has been appealed from by Talbott and Wood (No. 1405) is in excess of the power committed to the court below, remains to be considered in the light of the rules above stated. Bearing those rules in mind, and with no disposition to trench upon the salutary strictness of their operation, we are of the opinion that this decree is neither in opposition to nor in excess of the mandate.

It is quite true that in describing the effect of the conveyance of the deed of trust, the language of the opinion states the easement, as quoted in the preliminary statement. But it does not follow that the intention was to exclude from its comprehension other minor elements connected therewith and important to the enjoyment of the Victoria Flats building. The opinion states that the answers of Wood and Talbott admit not only the encroachment of the building upon the strip and the projection of the porches over the same for five feet, but also, "that the areaways along the walls of the building on the south and west sides thereof, as alleged in the bill and not denied in the answers, extend over and encroach upon the ground," etc., "to the extent of several feet." In the concluding portion of the opinion, which outlines the manner in which the property may be sold, either in its entirely or in parcels, and the proceeds distributed, it is said, "the parcel comprising the Victoria flats, together with the easement over the ten foot strip of ground adjoining on the south and west sides of the flats building, will be sold as one parcel," etc.

The admissions of the answers clearly covered the areaways and approaches, and their incidental uses, as well as the projecting porches, and the walls and windows in the same. The lien, therefore, that embraced the one necessarily embraced the other, and it is clear that the court in referring to the easement to be sold must have had them all in contemplation.

The enjoyment of light and air through the windows of a large apartment house and the use of projecting porches being the important items of the easement, it followed that they were chiefly in mind on the hearing, and were, consequently, given prominence in

the opinion without intention to except the other and minor elements of the general easement. The opinion did not undertake to enter into the specific details of the decree directed to be entered, but merely gave its general outlines; and knowing what was in mind, we are of the opinion that those limitations were not exceeded by the learned justice who passed the final decree.

It follows from what has been said that the decree on each appeal will be affirmed with costs. And it is so ordered. Affirmed.

TUESDAY, *May 24th, A. D.* 1904.

BRAINARD H. WARNER and LOUIS D. WINE, Trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, WILLIAM J. McCLURE, George C. Esher, Albert S. Reavis, *et al.*, } No. 1404.

and

H. MAURICE TALBOTT and FRANK I. WOOD, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, WILLIAM J. McCLURE, George C. Esher, Albert S. Reavis, *et al.* } No. 1405.

Appeals from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia on separate appeals, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 24, 1904.

In the Court of Appeals of the District of Columbia.

BRAINARD H. WARNER, Trustee, ET AL.
vs.
DAVID C. GRAYSON, Trustee, ET AL. } No. 1404.

And now come Brainard H. Warner and Louis D. Wine, trustees and Frank L. Freeman, Laura R. Gray and James P. Lowe, by B. W. Parker their attorney, and pray the court to grant them an appeal to the Supreme Court of the United States from so much and such part of the final decree passed herein on the 24th day of May 1904, as adjudicates that the deed of trust from Nicholas T. Haller to Brainard H. Warner and Louis D. Wine, trustees, is not a prior and first lien upon the easements in and over a strip of ground adjoining the land described in said deed of trust, to wit, a strip of ground

ten (10) feet in width extending along the entire west and south sides of the said described parcel of ground for purposes of light and air and of the free use of the overhanging porticos and other projections on the south and west sides of the Victoria Flats building, and the approaches to the entrances along the said sides of said building referred to in the pleadings as a cement walk along the said south and west sides thereof, and that the court will fix the amount of a bond to be given for costs on such appeal.

B. W. PARKER,
Sol. for Warner & Wine, Trustees, et al.

(Endorsed :) No. 1404. Warner trustee *et al. vs.* Grayson, trustee *et al.* Appellants' motion for an appeal to S. C. U. S. Court of Appeals District of Columbia. Filed Jun- 7, 1904. Henry W. Hodges, clerk.

TUESDAY, *June 7th, A. D.* 1904.

BRAINARD H. WARNER and LOUIS D. WINE, Trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, WILLIAM J. McClure, George C. Esher, Albert S. Reavis, *et al.* } No. 1404.

On motion of Mr. B. W. Parker, of counsel for the appellants in the above entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving bond for costs in the sum of four hundred dollars.

TUESDAY, *June 7, A. D.* 1904.

BRAINARD H. WARNER and LOUIS D. WINE, Trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, WILLIAM J. McClure, George C. Esher, Albert S. Reavis, *et al.*, } No. 1404.

and

H. MAURICE TALBOTT and FRANK I. WOOD, Appellants,
vs.
DAVID C. GRAYSON, Trustee; MICHAEL SHEA, WILLIAM J. McClure, George C. Esher, Albert S. Reavis, *et al.* } No. 1405.

On motion of Mr. John Ridout, of counsel for the appellees, H. Maurice Talbott and Frank I. Wood, in No. 1404 and for the appellants in No. 1405, it is ordered by the court that an appeal to the Supreme Court of the United States be, and the same is hereby,

allowed, and the amount of the bond to act as a supersedeas is fixed at $35,000, and the bond for costs is fixed at $400.

In the Court of Appeals of the District of Columbia.

BRAINARD H. WARNER ET AL., Trustees, Appellants,
vs.
DAVID C. GRAYSON, Trustee, ET AL. } No. 1404.

The clerk will enter the appeal prayed herein by H. Maurice Talbott and Frank I. Wood withdrawn.

JOHN RIDOUT,
Att'y for Talbott and Wood.

(Endorsed:) No. 1404. Brainard H. Warner *et al.*, trustees, *vs.* David C. Grayson, trustee *et al.* Order withdrawing appeal of Talbott and Wood. Court of Appeals, District of Columbia. Filed July 28 1904. Henry W. Hodges, clerk.

Know all men by these presents, that we, Brainard H. Warner and Louis D. Wine, trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, as principals, and Luther A. Swartzell as surety, are held and firmly bound unto David C. Grayson, trustee, Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward H. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew; Morse, Williams & Co., a corporation, Frank I. Wood, H. Maurice Talbott, Bernard A. Duke, Nicholas T. Haller, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, The First National Bank of Gaithersburg, and John C. Heald, in the full and just sum of four hundred (400) dollars, to be paid to the said David C. Grayson, trustee, Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew; Morse, Williams & Co., a corporation, Frank I. Wood, H. Maurice Talbott, Bernard A. Duke, Nicholas T. Haller, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, The First National Bank of Gaithersburg, and John C. Heald, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of June, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Brainard H. Warner and Louis D. Wine, trustees, *et al.*, appellants, *vs.* David C. Grayson,

trustee, *et al.*, appellees, No. 1404, a decree was entered against the said Brainard H. Warner and Louis D. Wine, trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, and the said Brainard H. Warner and Louis D. Wine, trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said David C. Grayson, trustee, Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew; Morse, Williams & Co., a corporation, Frank I. Wood, H. Maurice Talbott, Bernard A. Duke, Nicholas T. Haller, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, The First National Bank of Gaithersburg, and John C. Heald, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Brainard H. Warner and Louis D. Wine, trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, shall prosecute said appeal to effect, and answer all costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

BRAINARD H. WARNER. [SEAL.]
LOUIS D. WINE. [SEAL.]
LAURA R. GRAY. [SEAL.]
FRANK L. FREEMAN. [SEAL.]
JAMES P. LOW. [SEAL.]
LUTHER A. SWARTZELL. [SEAL.]

Sealed and delivered in the presence of
WILMER L. GREEN.

Sealed and delivered in the presence of
J. G. GRAY,
As to L. R. G.
C. B. RHEEM,
As to F. L. Chapman and J. P. Low.

Satisfactory.
J. J. DARLINGTON,
Sol. for Compl'ts.

Satisfactory.
J. J. DARLINGTON,
Sol. for Appellees.

Approved by—
R. H. ALVEY,
Chief Justice, Court of Appeals of the District of Columbia.

(Endorsed:) No. 1404. Brainard H. Warner, *et al.*, appellants *vs.* David C. Grayson, *et al.* Bond of Brainard H. Warner, *et al.*, on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jul- 30, 1904. Henry W. Hodges, clerk.

Know all men by these presents, that we, H. Maurice Talbott, and Frank I. Wood, as principals, and the Title Guaranty & Trust Company of Scranton, Penna., a body corporate under the laws of the State of Pennsylvania, as surety, are held and firmly bound unto David C. Grayson, trustee, Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, Morse Williams and Company, a corporation, hereinafter called the obligees in the full and just sum of thirty-five thousand ($35,000) dollars, to be paid to the said David C. Grayson, trustee, Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, Morse Williams and Company, a corporation, their certain attorneys, executors, administrators, successors, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 28th July, A. D., 1904.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court between the above named principals as appellants, and the above named obligees as appellees a decree was rendered against the said H. Maurice Talbott, and Frank I. Wood, and the said H. Maurice Talbott and Frank I. Wood, having prayed and obtained an appeal to the Supreme Court of the United States, to reverse the decree in the aforesaid suit, and a citation directed to the said obligees citing and admonishing them to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date thereof.

Now the condition of the above obligation is such, that if the said H. Maurice Talbott and Frank I. Wood, shall prosecute said appeal to effect and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

H. MAURICE TALBOTT. [SEAL.]
FRANK I. WOOD. [SEAL.]
THE TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNA.,
By EDWIN B. HAY, *Resident Vice-President.*

[Seal of the Title Guaranty & Trust Company of Scranton, Pa.]

Attest:
W. R. PARKER,
Special Agent.

Sealed and delivered in the presence of—
JOHN RIDOUT.

Amount and surety satisfactory.
J. J. DARLINGTON,
Sol. for Appellees.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

(Endorsed:) No. 1405. H. Maurice Talbott, *et al.*, appellants, *vs.* David C. Grayson, trustee, *et al.* Supersedeas bond on appeal to S. C. U. S. Court of Appeals, District of Columbia. Filed Jul- 30, 1904 Henry W. Hodges, clerk.

UNITED STATES OF AMERICA, *ss:*

To David C. Grayson, trustee; Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruett, Fred Drew, Morse, Williams & Co., a corporation; Frank I. Wood, H. Maurice Talbott, Bernard A. Duke, Nicholas T. Haller, Frederick W. McReynolds, James H. Meriwether, Alice S. Hill, Charles M. Carter, Charles L. Frailey, The First National Bank of Gaithersburg, and John C. Heald, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Brainard H. Warner and Louis D. Wine, trustees, and Frank L. Freeman, Laura R. Gray, and James P. Lowe, are appellants and you are appellees, to show cause, if any there be, why the

decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 30th day of July, in the year of our Lord one thousand nine hundred and four.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted for Wood, Talbott & First Nat'l Bank of Gaithersburg.
JNO. RIDOUT.

Aug. 2/04.

Service accepted.
MACKALL & MAEDEL,
Att'ys for Morse, Williams & Co.

Service accepted this 1st day of August, 1904.
J. J. DARLINGTON,
Sol. for Appellees Grayson et al., Complainants Below.
JESSE E. POTBURY,
Sol. for Appellee Fred Drew.

[Endorsed:] Court of Appeals, District of Columbia. Filed Aug. 2 1904. Henry W. Hodges, clerk.

UNITED STATES OF AMERICA, *ss:*

To David C. Grayson, trustee; Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis, David C. Grayson, Calvin Cain, Thomas R. Riley, George H. Zellers, John E. Sheckells, Edward J. Hannan, Charles A. Muddiman, Frederick W. Buddecke, John R. Galloway, Charles Ernest, Daniel A. Donnelly, John M. Pruit, Fred Drew, and Morse, Williams and Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein H. Maurice Talbott and Frank I. Wood are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 30th day of July, in the year of our Lord one thousand nine hundred and four.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Aug. 2 / 04.

Service accepted.
MACKALL & MAEDEL,
Att'ys for Morse, Williams & Co.

Service accepted, this 1st day of August, 1904.
J. J. DARLINGTON,
Sol. for Appellees.
JESSE E. POTBURY,
Sol. for Appellee Fred Drew.

[Endorsed:] Court of Appeals, District of Columbia. Filed Aug. 2 1904. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

BRAINARD H. WARNER ET AL., Appellants, *vs.* DAVID C. GRAYSON ET AL., Appellees. } No. 1404.

and

H. MAURICE TALBOTT ET AL., Appellants, *vs.* DAVID C. GRAYSON ET AL., Appellees. } No. 1405.

It is stipulated and agreed by and between the parties to the above entitled causes, by their respective attorneys, that the record in each of the cases on appeal to the Supreme Court of the United States shall consist of the record used in this court in the case of Frank I. Wood, *et al. vs.* David C. Grayson, *et al.*, No. 1304, together with the proceedings and orders in this court therein and the record used in this court in the said above entitled causes Nos. 1404 and 1405, and the orders and proceedings of this court therein, and that the record may be copied and certified as one record.

J. J. DARLINGTON,
Sol. for Complainants.
JOHN RIDOUT,
Sol. for Appellant in 1405 *and Certain Appellees in* 1404.
B. W. PARKER,
Sol. for Warner, Wine, Freeman, Lowe, & Gray.
MACKALL & MAEDEL,
Att'ys for Morse, Williams & Co.
JESSE E. POTBURY,
Sol. for Fred Drew.

(Endorsed:) Nos. 1404 & 1405. Warner *et al.*, appellants, *vs.* David C. Grayson *et al.*, and Talbott *et al.*, appellants, *vs.* David C. Grayson *et al.* Stipulation as to what shall constitute record to be transmitted to S. C. U. S. Court of Appeals, District of Columbia. Filed Aug. 2, 1904. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true copy of the record and proceedings of the said Court of Appeals, as agreed upon by counsel in the cases of Brainard H. Warner and Louis D. Wine, trustees, and Frank L. Freeman, Laura R. Gray and James P. Low, appellants, *vs.* David C. Grayson, trustee; Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis *et al.*, and H. Maurice Talbott and Frank I. Wood, appellants, *vs.* David C. Grayson, trustee; Michael Shea, William J. McClure, George C. Esher, Albert S. Reavis *et al.*, Nos. 1404 and 1405, April term, 1904, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 11th day of August, A. D. 1904.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,458. District of Columbia Court of Appeals. Term No. 358. Brainard H. Warner and Louis D. Wine, trustees; Frank L. Freeman, Laura R. Gray, and James P. Lowe, appellants, *vs.* David C. Grayson, trustee; Michael Shea, William J. McClure, *et al.* File No. 19,459. Term No. 359. H. Maurice Talbott and Frank I. Wood, appellants, *vs.* David C. Grayson, trustee; Michael Shea, William J. McClure, *et al.* Filed August 26th, 1904. File No. 19,458 and 19,459.

FILE COPY.

FILED
NOV 13 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 439.

FRANK I. WOOD ET AL., APPELLANTS,

vs.

DAVID C. GRAYSON, TRUSTEE, ET AL.

Now come the appellants, by their counsel, and move the court as follows:

1. To dispense with the printing of the record herein.

2. To advance the cause and hear the same with Nos. 89 and 90, October term, 1905, on the record in those appeals and as one case with them.

The grounds of these motions are:

1. That this appeal is from the first decree passed in the cause below.

2. The appeal and cross-appeal in 89 and 90 are from the second decree passed in said cause.

3. The whole of the record in this cause is already printed in Nos. 89 and 90.

4. There is nothing to be argued on this appeal which will not of necessity be argued in 89 and 90.

5. If these motions be granted, the time and labor of the court will be saved.

6. Counsel on both sides have, subject to the court's approval, stipulated that the above-stated action be taken.

JOHN RIDOUT,
CHARLES F. CARUSI,
Attorneys for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

FRANK I. WOOD ET AL., *Appellants*,
vs.
DAVID C. GRAYSON, *Trustee*, ET AL.

In this cause it is stipulated by counsel, subject to the court's approval, as follows:

1. That printing of the record herein be dispensed with.

2. That this cause be advanced and heard with Nos. 89 and 90, October term, 1905, on the record in those cases and as one case with them.

CHARLES F. CARUSI,
JOHN RIDOUT,
Attorneys for Appellants.
J. J. DARLINGTON,
Attorney for Appellees, the Original Complainants.
JESSE E. POTBURY,
Attorney for Fred Drew.
JULIUS A. MAEDEL,
Attorney for Morse, Williams & Co.

In this case it is stipulated that no formal notice of the submission of the motion to dispense with printing and advance shall be required, and that said motion may be submitted to the court on the first available motion day.

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Supreme Court U. S.
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Clerk.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 89.

BRAINARD H. WARNER AND LOUIS D. WINE, TRUSTEES, ET AL.,

vs.

DAVID C. GRAYSON, TRUSTEES, ET AL.

No. 90.

FRANK I. WOOD, ET AL.,

vs.

DAVID C. GRAYSON, TRUSTEES, ET AL.

Brief on Behalf of Appellants in No. 89, Warner and Wine, Trustees, et al.

B. W. PARKER,
L. GOLDEN DONALDSON,
Solicitors for Warner and Wine, Trustees, et al.

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Statement of the Case.

This is an appeal from so much of the decree entered by the Court of Appeals of the District of Columbia as denies to the appellants in No. 89, Warner, Wine, and others, a lien for the security of their trust debt upon the easements in and over the strip of ground, 10 feet wide, on the south and west sides of the Victoria Flats building.

The material facts bearing on this question are that Mrs. Alice S. Hill, being the owner in fee simple of lots 1 and 2, block 45, of Hill's subdivision, University Park, located on the southwest corner of Fourteenth street and Welling Place, northwest, in the city of Washington, District of Columbia, each lot fronting 75 feet on Fourteenth street and running back 190 feet (a plat of said property is shown on page 12 of the record), did on January 13, 1897, convey the same in fee simple to the defendant, Nicholas T. Haller.

On the 22d day of January, 1897, said Haller made a building loan in the sum of $75,000 for the purpose of building an apartment house, to be known as the Victoria Flats, on that portion of said lots fronting 120 feet on Fourteenth street by the depth of 124 feet on Welling Place, and to secure said sum conveyed to the appellants, Warner and Wine, as trustees, the said property, "together with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise, however, of the parties of the first part, of, in, to, or out of the said land and premises; to have and to hold the said land, premises, and appurtenances, unto and to the only use of the parties of the second part (Warner and Wine, trustees), the survivor of them, his heirs and assigns," etc. (see stipulation, Rec. pp. 174–5), and said Haller thereupon began the erection of said apartment house, and said $75,000, borrowed and secured as aforesaid, were advanced to him upon the faith and credit of the security afforded by the Victoria Flats building completed.

That on January 22, 1897, (and simultaneously with the execution of the deed of trust to Warner and Wine) the said Haller conveyed the remaining portions of said lots 1 and 2 to the appellees, McReynolds and Mer-

riweather, to secure his promissory notes in the sum of $12,315.

At the time of the making of the said deed of trust to Warner and Wine it was understood that Haller would so erect the building upon that portion of said lots 1 and 2, conveyed to said Warner and Wine, that a sufficient portion thereof would be left to furnish necessary light and air for said building, and approaches over the cement walks and through the areaways to the coal cellars, garbage chutes, and other necessary parts of the building, but on account of the claim of an adjoining landowner that there existed a restriction which required any building erected upon said lots to be placed back from the building lines on Fourteenth street and on Welling Place to a certain extent, Haller so constructed said building that its south and west walls extended back to the south and west lines of the property conveyed to Warner and Wine, in which south and west walls of the building so erected certain windows, doors, areaways, porches, and eaves were necessarily constructed which looked out upon, and extended over, the remaining portions of said lots 1 and 2 (conveyed by the Merriwether and McReynolds trust), by reason whereof, and the facts hereinafter stated, an easement in favor of the building and the ground on which it stands was created. That there is absolute necessity that said building should have the benefit of said easement, is abundantly shown by the proof.

Mr. Swartzell, who is connected with the real estate firm of B. H. Warner & Co., and who has been in the real estate business for about 24 years, testified that the effect upon the value of this property, for use and occupation, of closing the windows and doors on the south and west sides and moving the porches and areas on those sides would be disastrous; that a number of the apartments would be injured very seriously; that it

would affect two-thirds of the building at least; that the apartments on these sides would be rendered practically unavailable; and that it would seriously affect the salability of the property (Rec. pp. 48–9).

Mr. Robt I. Fleming testified that he had practiced his profession, that of an architect, for 40 years; that he had examined the Victoria Flats building; that the effect of constructing a building on the 10-foot strip right next to said Victoria Flats building on the south and west sides would really ruin the building, by blocking up the windows in these sides, making dark rooms; and in response to a question whether that effect would be obviated or improved in anyway by recesses, said:

> "There are recesses on the south, and windows could be cut into one room on each side of the recess, but they would still be dark rooms. Any building constructed south or west would block up the light" (Rec. p. 125).

Mr. James G. Hill, an experienced architect, testified that—

> "if a building were put up against the flats and had light wells where they could exist, it would afford partial relief; but still that would not eradicate the injury; that if there were no light wells at all it would practically ruin the rooms in the west and south sides" (Rec. pp. 129–30).

Frank I. Wood, one of the appellees, says in his answer, paragraph 5 (Rec. p. 19),

> "that upon due inquiry and inspection, it would have appeared to the complainants that the said property (i. e., Victoria Flats), owing to its improvident plan of construction, was dependent for certain of its light and air upon adjoining property,"

and this part of the answer is adopted by Wood's codefendant Talbott (said Wood and Talbott are appel-

lants in case No. 90, whose interests, if any, in said property will be hereafter shown). Despite this sworn statement, Wood, after testifying that he had acquired the 10-foot strip on the south and west sides of the building at the same time he purchased the Victoria Flats, evaded answering directly why this strip was desirable to him, and even testified that he did not know of any injurious effects that would result to the Victoria Flats if anybody built on the adjoining 10-foot strip. Finally he was asked:

> "Do you deny that if this land surrounding the Victoria Hotel property was built upon close up to the flats property, that the flats would be deprived of light and air?"

He answered, "No, sir" (Rec. p. 96). Talbott, although he refused to purchase the Victoria Flats until he was sure of controlling the 10-foot strip, testified that the building, deprived of light and air on those sides, would be less valuable, but that the question of the Victoria Flats being thus deprived of light and air did not enter into our (his and Wood's) calculations.

That Haller recognized the importance of this situation and endeavored to relieve it, is established beyond any doubt, as will be hereafter shown.

Upon the completion of the said Victoria Flats building the said Haller was indebted to various persons for material and labor furnished in connection with the building thereof in the sum of $30,087.65, and also for borrowed money in the sum of $10,350. To secure said last two mentioned sums, aggregating $40,437.65, Haller executed on December 20, 1897, a further deed of trust to Grayson and Heald, trustees, upon that portion of said lots 1 and 2 mentioned and described in the trust to Warner and Wine.

Simultaneously with this transaction Haller, being then financially much involved, executed to Holt and

Sebring, trustees, a fictitious deed of trust, purporting to secure the payment of his promissory notes, in the sum of $34,000, payable to William Oscar Roome and William J. McClure, on all of said lots 1 and 2, except those portions described in the trust to Warner and Wine. That this was a fictitious transaction appears from the testimony of McClure himself, one of the payees of the alleged notes, who testified that the first intimation he had of such a deed of trust was about September 6, 1899, nearly two years after its execution, and that he had never indorsed any of the notes (Rec. p. 40). About this time an arrangement was entered into by Haller and the parties interested in the trusts on the property whereby the rents were collected and the building managed by the real estate firm of Warner & Co., who were to use said rents to pay the interest on the first trust, taxes, insurance, and other charges, and apply the balance toward the second trust; and so long as this arrangement existed this was done, and no default occurred under the first trust.

On the 31st day of December, 1897, Haller executed a conveyance to the appellee, Bernard A. Duke (who acted therein solely for Haller, said Duke paying nothing for the conveyance), of those portions of lots 1 and 2, fronting 130 feet on Fourteenth street and running back 134 feet on Welling Place, thereby embracing all of the property described in the deed of trust to Warner and Wine, and in addition thereto a strip of ground 10 feet wide along the south and west walls of the Victoria Flats building. By this conveyance Haller himself by deed thus annexed the said 10-foot strip to the property on which the building stood.

Thereafter, on the 13th day of March, 1898, the defendant, Haller, conveyed to the appellee, Wood, the remaining portions of said lots 1 and 2. The only consideration paid by Wood for this conveyance was an equity

in two lots in the District of Columbia, of no value, and which were afterwards foreclosed for not more than enough to pay the trusts upon them. (Rec p 63)

Although all the remaining portions of said lots 1 and 2 were conveyed to Wood, as stated, he and Haller entered into a contemporaneous agreement, by which Haller, in consideration of the conveyance to him by Wood of the equity in said lots, agreed to further convey to Wood an undivided one-half interest in the Victoria Flats building and the ground upon which it stood, together with the 10-foot strip surrounding it (the title to which was then in Duke), in which agreement it was provided that Wood and Haller should form a stock company for the purpose of owning said apartment house and conducting the same, but said company was never organized, and Wood retained the title to said property. Thereafter, on the 1st day of April, 1899, Haller, in consideration of the payment to him by the appellee, Talbott, of $3,100, agreed in writing, under seal, to have conveyed to Talbott a one-half interest in the Victoria Flats building—

> "and the ground surrounding it, together with all and singular the rights and appurtenances thereto belonging, and also the furniture in said hotel."

The said agreement included this further language:

> "And I hereby authorize and direct Frank I. Wood and Bernard A. Duke, the parties in whose names the title now stands, to make and execute and deliver to said H. Maurice Talbott such deeds or conveyances as may be necessary the better to carry out the above contract" (Rec. p. 111).

This shows that, on the date of the making of said agreement, Duke and Wood held the legal title to all of said lots 1 and 2, and were acting therein at the direction of the said Haller, who could not hold title in

his own name because of his financial troubles. Up to the time of the filing of the original bill in this cause, the direction of said Haller to Duke and Wood to convey a one-half interest in certain of said property to Talbott had not been carried out.

Thereafter, on the 13th day of March, 1899, Duke, acting under the direction of Haller, executed a conveyance to Wood of the strip of ground 10 feet wide running along the south and west walls of said Victoria Flats building, being the same strip included in the deed from Haller to Duke, as hereinbefore mentioned, which was nothing more than an attempt to inequitably and fraudulently separate said easement from said building. On the same day the fictitious trust which Haller executed to Holt and Sebring, trustees, was by said trustees released to said Wood.

In paragraph 4 of the bill (Rec. p. 4), it is averred that—

> "In view of the said situation, an arrangement was entered into between the said defendant, Haller, and the holders of the promissory notes secured by the deed of trust to the defendants, McReynolds and Merriwether, by which, upon payment by said Haller or his assigns of four thousand dollars ($4,000) of the said encumbrance upon the said adjacent portion of the said lot, and extending along the entire western and southern exposures of the said Victoria Flats, should be released to the said Nicholas T. Haller, and be and become a part of said Victoria Flats property."

In paragraph 4 of the amended answer of Wood, which is adopted by and made part of the answer of Talbott, both of which are sworn to, the following specific denial is made (Rec. p. 18):

> "He (Wood) denies that any agreement was ever entered into between the defendant, Haller, and the holders of the promissory notes secured

by the deed of trust to McReynolds and Merriwether, that, upon payment of four thousand dollars ($4,000.00), the ten-foot strip adjoining the building on south and west should be released and become part of the Victoria Flats property."

The following letter (Rec. p. 112) signed by F. W. McReynolds (the trustee named in the McReynolds and Merriwether trust), and the receipt (Rec. p. 113) signed by said Wood, prove conclusively that there was an agreement to release the 10-foot strip, and that Wood was conversant with this fact:

[Letter.]

"OFFICE OF F. W. MCREYNOLDS, ATTORNEY AT LAW.

14th Feb., 1898.

N. T. HALLER, ESQ.

DEAR SIR: On behalf of C. M. Carter and Mrs. Alice S. Hill, holders of the notes secured. I desire to state that on the payment of the $4,000 due Jan. 22, '98, on pts. lots 1 & 2 B. 45 University Park by March 10, 1898, the trustees will be directed to release to you the 10 ft. adjoining the Victoria on the south & west.

Yours truly, F. W. MCREYNOLDS."

[Receipt.]

"WASHINGTON, D. C., *M'ch, 23, '98.*

Received of Nicholas T. Haller a deed of trust dated March 21, 1898, from Nicholas T. Haller et ux., to Frank T. Browning and Jesse H. Wilson, trustees, to secure the payment of a note made by said Haller for the sum of $6,000.00/100 which note and trust is to be placed in bank as collateral for the payment of a note made by Frank Ivey Wood for the sum of $4,000, which amount is to be used to pay two notes of said Haller, past due, and to obtain the release of certain land from the operation of a deed of trust, dated Jan. 24, 1897, to McReynolds and Meriwether, trustees.

FRANK IVEY WOOD."

In furtherance of this endeavor to obtain this release, the $4,000 were raised by borrowing that sum from the First National Bank of Gaithersburg upon the security of $4,000 of the McReynolds notes as collateral, which loan not having as yet been paid to the bank, the release has not been obtained. Also in paragraph 4 of Wood's answer the following language is used:

> "This respondent denies that the motive of the transactions between said Haller and the said McReynolds was to add the said 10-foot strip to the said flats property."

This denial the respondent persisted in (Rec. p. 99) until counsel for complainant produced an agreement (Rec. p. 100) in Wood's handwriting, in which, for a consideration therein named, Haller agreed to convey to Wood—

> "an undivided one-half interest in the parts of lots 1 and 2, . . . contained within the following metes and bounds, viz: Commencing at the southwest corner of Fourteenth street and Welling Place, and thence running southerly 130 feet; thence westerly 134 feet; thence northerly 130 feet to Welling Place, and thence westerly 134 feet to the place of beginning."

This description included the Victoria Flats property, with the 10-foot strip added.

Wood and Talbott claimed to be the owners of said real estate, and in the exercise of their authority as such, and with the concurrence of Heald (Rec. p. 44), terminated the authority and agency of said Warner & Co., hereinbefore set forth, and the collection of rents was assumed by Wood, with the concurrence of Talbott (Rec. pp. 19–20). Wood represented that he and Talbott could manage the property as well as Warner & Co., and would be saving the commissions paid to that firm (Rec. p. 44).

After the termination of the agency of said Warner & Co., as aforesaid, Wood then assumed the collection of rents, and did not keep up the interest on the first trust out of the rents collected, so that a default occurred under both the deed of trust to Warner and Wine, and the deed of trust to Grayson and Heald.

Wood claimed to be the owner of the 10-foot strip surrounding said building on the south and west sides, as well as the portions of said lots 1 and 2, except that portion on which the Victoria Flats building stood, and by reason thereof represented that the said building was not entitled to any easement over the strip surrounding it on the south and west sides for necessary light and air, and in other ways decried the security of the second trust, and undertook to purchase the notes secured by said second trust at a heavy discount.

It is alleged in paragraph 9 of the bill that Wood and Talbott endeavored to purchase the notes secured by the Grayson and Heald trust at a discount, and threatened that those who refused to accept their offer would get nothing, in one instance declaring that they would see that they got nothing. In the ninth paragraph of the answer of Wood, he—

> "denies that he ever attempted to purchase the promissory notes secured by the said second deed of trust . . . at any discount whatever, or that he ever made any threats that those who refused to accept such discount would get nothing, or that he ever declared that he would see that they got nothing."

This sworn statement is entirely disproved by the testimony of the following witnesses: Grayson, at page 38; McClure, p. 40; Zellers, p. 41; Mrs. McClure, p. 43, and Esher, p. 50; although he (Esher) did not identify the defendant, Wood, he (Esher) said the man who talked to him about buying his notes told him his name was

Wood. Indeed, Wood himself flatly contradicts his former statement on pages 53, 54, 55, and 56. The purpose of their thus desiring to obtain these notes was to afford them, Wood and Talbott, an opportunity of getting a new loan of $100,000 and paying off the indebtedness, amounting to, approximately, $119,000, due on the Victoria Flats property. Their failure to accomplish this purpose is attributed to Grayson, who consented to reduce the amount of his notes, but declined to give them any option to speculate upon (Rec. p. 38).

By reason of the default under the first deed of trust, hereinbefore set forth, Warner and Wine, as trustees, advertised said property to be sold thereunder, said sale to take place on the 6th day of September, 1899. When the attention of Grayson, the active trustee under the second trust, was called to the advertisement, he went to see Wood in his office to ascertain why the property was being sold. Wood told him that he did not have the money to pay the interest, that he (Wood) had not been to Warner with any offer to pay the money, or to ask for any indulgence if the money could be raised (Rec. p. 37). Later, Grayson went to see Wood at the latter's house, and offered to advance money enough to pay the interest on the first trust, but Wood refused to accept it, saying he would see Talbott, and then let him (Grayson) know (Rec. p. 37). Four or five days later they had another interview, at which the following occurred, as testified to by Grayson:

> "I gave them this letter of August 25, a demand I made upon them for the money to pay the interest on the first mortgage, and they (Wood and Talbott) intimated as much as that they were not willing to turn it over to me; they did not know that Warner would take the money. I offered to them, if they would go with me and pay their part, I would pay the balance. They did not agree to that. Then Mr. Talbott said that Mr.

> Wood was tired of managing the property in the interest of the second trust holders, and Mr. Wood spoke up and said they intended to make their money out of the ground, and I think Mr. Talbott reiterated that fact. Then I asked them the question, what they would want for the ground, or its value. I don't know the words exactly of the answer, but Mr. Talbott said he did not know, but it would be high enough" (Rec. p. 38).

No effort was made to communicate with Mr. Warner to see if he would accept Mr. Grayson's proposition.

After the property had been advertised, Wood asked Mr. Rheem, of the firm of B. H. Warner & Co., not to put a sign in front of the Victoria Flats property (Rec. p. 59), because he did not want to inconvenience anybody in the house (Rec. p. 108), although he did not care whether they left or not (Rec. p. 109).

Four days prior to the date of sale, to wit, September 2, 1899, the appellee, Wood, filed in the Supreme Court of the District of Columbia his bill of complaint against the appellee, Duke, alleging that the said Duke was the owner of that portion of said lots 1 and 2 upon which the Victoria Flats building was erected, and that he, said Wood, was the owner of all the remaining portions of said lots, and also alleging that the windows, doors, areaways, and other projections of the said Victoria Flats building extended over upon that portion of said lots alleged to be owned by the said Wood, and that the same were a nuisance, which he was entitled to have abated, and prayed for a mandatory injunction for the removal of said openings and projections.

This bill was filed by Wood for the purpose of keeping prospective bidders from bidding upon said property at the sale, so that the property would sell for a small sum, and that he and Talbott might buy it in and cut out the

parties secured under the second deed of trust, who had, by their materials and labor, as before stated, contributed to the construction of the building.

Although Mr. Wood, in his amended answer, stated "that no claim was ever made by any one to any such rights with respect to the 10-foot strip until the filing of the bill in this cause" (meaning the bill filed in this cause, in which this appeal is taken), Wood testified (Rec. p. 107) that when he filed his bill against Duke Mr. Grayson had asserted that he was going to claim a portion of the adjoining land.

On the 6th day of September, 1899, the day on which Warner and Wine had advertised their sale to take place, the bill of complaint in this cause was filed by David C. Grayson, one of the trustees in the deed of trust to secure Grayson and Heald, and the parties secured thereby; the said Heald declining to join because, as attorney, he represented interests adverse to the complainants, and for that reason he was made a defendant. Said sale by Warner and Wine did not occur, but receivers were appointed in this cause to take possession of the property pending this suit, and to collect the rents, issues, and profits thereof, which they did, and the receivers have ever since been in the control and possession of said property.

QUESTION AT ISSUE.

The question presented for the decision of this court is whether, in view of the situation and circumstances herein recited, the parties who made the said building loan of $75,000 to Haller for the erection of said building are not entitled to have their debt paid out of the proceeds of a sale of the said Victoria Flats building and the plot of ground on which it stands, being the ground described in the deed of trust to said Warner and

Wine, trustees, together with the easements appurtenant thereto.

At the time Haller gave the deed of trust to Warner and Wine, he was the owner of all of lots 1 and 2, and the $75,000 were loaned and advanced to him to erect the Victoria Flats building, and were used in the construction thereof. The parties loaning said money advanced the same upon the faith of the security which would be afforded by the completed building, with porches, areaways, and easements; and all of the notes aggregating said $75,000 are now outstanding, overdue, and unpaid, in the hands of a large number of persons.

It was never intended or contemplated by Haller, or by the persons advancing said building loan, that the building should be so constructed that its south and west walls would rest upon the south and rear lines of those portions of lots 1 and 2 described in the deed of trust to Warner and Wine, and still less that they should rest partly upon the ground covered by the McReynolds and Meriwether trust; but it was understood that said building would be so constructed that a sufficient portion of said building site would be utilized to supply the necessary porches, areaways, cement walks, entrances, and other conveniences for the reasonable use and enjoyment of said building, and it was only because of the said claim of a building restriction requiring said building should set back from the building lines of said lots that this plan was not carried out, and the building was constructed as it now stands.

The building contains "flats" or apartments for the housing and residences of families, and for the reasonable use and occupation of said building it is necessary to provide space for the porches, light, air, and ventilation to said apartments, and approaches to coal cellars and garbage chutes over the cement walks and through the areaways. There are

19 windows, 5 doors, and 4 cellar windows in the south side of said building, and 36 windows, 17 doors, and 4 cellar windows in the west side thereof. There is also a cement walk extending from the south and west walls of said building, which affords the only approach to the coal cellars, garbage chutes, and other necessary parts and conveniences of the building. There are porches on each floor of the south and west walls of said building extended over the 10-foot strip, and the eaves or roof of the building also extend beyond the south and west walls thereof. (See Rec. p. 51 and Stipulation Rec. pp. 162–3).

The apartments in which these openings are inserted are necessarily dependent upon the adjacent property for light, air, and ventilation.

ASSIGNMENT OF ERROR.

The court erred in denying to the holders of the notes secured by the Warner and Wine trust the benefit of the easement in the 10-foot strip.

ARGUMENT.

Equities.

We submit that the holders of the notes secured by the Warner and Wine trust are equitably entitled to the benefit of the easement over the 10-foot strip, for the reason that the $75,000 which they advanced was the means of erecting the building, and thereby creating the security.

As has been conclusively demonstrated by the proof in the case, it was intended by the appellee, Haller, at the time he obtained the loan to construct the building, that it would be sufficiently within the lines of the

property described in the deed of trust as to afford sufficient space for necessary light, air, ventilation, cement walks, approaches to the coal cellars, basement, garbage chutes, the porches, and the eaves or roof of the building, and the parties advanced their money upon the faith of that security.

It is not claimed, and, if denied, can not be claimed, that any notice was given of the change made by Haller in the plan of construction of said building, so that its south and west walls encroached upon the adjoining property and left it in the condition of impaired value and security, shown by the record.

The building erected is an apartment house, and contains, on the south and west portions of the building, many apartments for the residences of different families, so that it is absolutely indispensable that the south and west sides of said building shall have light, air, and ventilation, and that ingress and egress shall be afforded over the cement walks and areaways to the coal cellars, garbage chutes, and other necessarily used portions of the building.

This is the character of building which, it was understood both by the appellee, Haller, and the parties loaning the money under the Warner and Wine trust, should be erected, and the money so advanced was loaned for that purpose and no other.

At the time of the execution of the said deed of trust, and also at the time the building was fully completed, the appellee was the owner of all of said lots 1 and 2, comprising both the quasi-dominant and quasi-servient tenements.

The only other persons who had any interest in the matter, at that time, were the holders of the notes secured by the McReynolds and Meriwether trust, and none of them have opposed the claim of the holders of the notes under the Warner and Wine trust.

The only persons who are opposing the claim of the parties secured by the Warner and Wine trust are appellees, Talbott and Wood. What interest have they in the property? It will be remembered from the record that, after the execution by Haller of all the deeds of trust, Wood and Talbott acquired each a one-half undivided interest in the property. Whether they paid much or little, or anything, for their interest in the property does not affect the question at issue. At the time they became interested in it the building was fully completed, with the encroachment upon the adjoining property plainly apparent and fully known to them. Whatever interest they took in the property they admit was with full notice of the existence of said easements and of their necessity.

Aside from this, however, it was the intention of the appellee, Haller, from the beginning, to annex to the Victoria Flats building the 10-foot strip. It will be remembered that he attempted to do this in several ways: 1st. By making the agreement with the parties, secured under the McReynolds and Meriwether trust, to which Wood was a party (see Exhibit Receipt, Rec. p. 119), by which the 10-foot strip was to be released by the holders of that trust upon the payment to them of the $4,000; that he made an effort to pay said indebtedness by borrowing the money from the First National Bank, of Gaithersburg, and the only reason the said 10-foot strip was not released from the said trust is because two of the notes, secured by said trust, were used as collateral security to raise the money, and, said notes not having as yet been paid, the release was not executed.

2d. Haller, again, did actually annex the 10-foot strip by making the conveyance of the flats building site, together with the 10-foot strip, in one conveyance to the appellee, Duke. In this connection, it is to be re-

membered that Wood and Talbott acquired no interest in the property until after this conveyance, of which they had full and complete knowledge.

3d. By his contract of April 5, 1898, with Wood, by which the flats building, together with the 10-foot strip, as one property were to be conveyed and held together by a stock company.

In any event, Wood and Talbott, in that situation of affairs, and with the full knowledge which they admit was theirs, could not take a greater interest in the property than the defendant Haller himself had, and certainly, by reason of his conduct and the situation as it then stood, Haller could not have deprived the said flats building of the benefit of the easements.

That the easements over the 10-foot strip are absolutely indispensable to the flats building has been admitted by all. The appellee, Talbott, conclusively admitted, in his testimony (Rec. p. 82), that it would be foolish for a man to build a house of that kind on the ground, "and then he put a trust on the surrounding land," and before he would purchase an interest in the property from Haller he insisted upon the assurance of Haller that he had made arrangements to obtain, from Meriwether and McReynolds, a release of the 10-foot strip.

The appellee, Wood, showed his appreciation of the necessity of the 10-foot strip to the building, by seeking to have it come with his contract, detached from the building, for the very purpose of being thereby enabled to cut out the second trust note holders by a foreclosure sale under the first trust bought in by himself, and by his pretended suit against Duke to prohibit the use of the strip, and thereby exclude competition at the sale.

The deed of trust executed by Haller to Warner and Wine conveyed to them the land on which the building was erected, "together with all and singular the improvements, ways, easements, rights, privileges, and appurten-

ances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises, to have and to hold the said land, premises, and appurtenances, unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns," so that there was a clear understanding between the parties advancing the money and Haller himself, that they should have, as security for the money advanced, all of the land and the completed building, according to the agreement, with the full and complete enjoyment of all the necessary light, air, ventilation, approaches, etc., hereinbefore referred to.

The holders of the notes secured by the Warner and Wine trust, then, are entitled to the benefit of the easement over the 10-foot strip for four reasons, namely:

1st. Because any improvements made upon the real estate by Haller, after the execution by him of the trust to Warner and Wine, enured to the benefit of the parties secured by such trust.

2d. It is the undisputed fact that the money secured by the Warner and Wine trust was a building loan, and that they were to have security for the money advanced, not only upon the land mentioned in the deed of trust, but upon the building fully and completely finished as an apartment house. The porches, the necessary and intended facilities for light, air, and ventilation; the approaches to the basement and cellars, the garbage chutes, etc., were and are an actual, as well as a necessary, part of the completed building.

3d. Because it was their money, advanced under the said agreement, which erected the building, which building was intended and offered as a security therefor, and was obtained only on the faith of that security.

4th. Because the conduct of Haller, Duke, Talbott,

and Wood shows that they all knew and considered the 10-foot strip to be an absolute and indispensable part of the flats building, understood and intended to be annexed thereto, and they are now estopped from denying to the building the benefit of the necessary easements afforded by it, and which it was intended to afford.

Points and Authorities.

All improvements and betterments made upon real estate, by the mortgagor, or those claiming under him, after the execution of the mortgage, inure to the benefit of the mortgagee and become a part of the security for the debt.

10 A. & E. Enc. of Law (1st ed.), 260.
16 A. & E. Enc. of Law (2d ed.), 119, 120.
Owen *vs.* Fields, 102 Mass. 102.
1 Jones on Mortgages, sec. 681.
Scanlon *vs.* Geddes, 112 Mass. 17.
Snow *vs.* Orleans, 126 Mass, 456.
Martin *vs.* Beatty, 54 Ill. 100.
Rice *vs.* Dewey, 54 Barb. 455.
Union Water Co. *vs.* Murphy Fluming Co., 22 Cal. 621.
Booream *vs.* Wood, 27 N. J. Eq. 371.
Childs *vs.* Dolan, 5 Allen (Mass.), 319.
Holmes *vs.* Morse, 50 Me. 102.
Butler *vs.* Page, 7 Met. (Mass.), 40.
Graeme *vs.* Cullen et al., 23 Gratt. (Va.), 266.
Wharton *vs.* Moore, 84 N. C. 479.

An agreement to convey a house is construed to be an agreement to convey the land on which it is situated, and so much more owned by the constructor, as is necessary to the beneficial enjoyment of the house (Scanlon *vs.* Geddes, 112 Mass. 17; Snow *vs.* Orleans, 126 Mass. 456).

The mortgage of real estate includes not only the improvements then existing thereon, but all that may subsequently be added thereto (Union Water Co. *vs.* Murphy, F. F. Co., 22 Cal. 631–2). In that case it is said:

> "It was evidently the intention of the parties that the mortgage should cover and include the whole sluice and flume, as well that which was then completed as that portion then unfinished and which might thereafter be completed. The appellant, Traver, who is the subsequent mortgagee, contends that the mortgagor could only mortgage the part then completed, and that the decree of foreclosure is erroneous, as it includes the whole flume, which, since the date of the mortgage, has been completed, and that it should be limited to that portion only which was finished at the date of the mortgage. This objection to the decree is not valid. The mortgage includes, as we have shown, the uncompleted as well as the completed portions of the flume, and is equally valid as against the former as against the latter. The property mortgaged was in the nature of real estate, and the mortgage, without any special provision, would include all improvements or fixtures then on the line located for the flume, as well as those which might thereafter be put thereon."

Improvements put upon unimproved real estate, after the execution of a mortgage thereon, belong to the mortgagee, as a security for his debt.

Butler *vs.* Page, 7 Metcalf (Mass.), 40.

The court in that case said:

> "All buildings erected and fixtures placed on the mortgaged premises, by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will therefore inure to the benefit of the mortgagee so far as they increase his security for his debt; and to the same extent they enhance the value of the equity

of redemption, and thereby inure to the benefit of the mortgagor Winslow *vs.* Merchants' Ins. Co., 4 Metc. 306. There is no necessity to adopt any liberal rule in regard to fixtures, to enable a mortgagor to remove what he has erected at his own expense; because he has the full benefit of all such improvements when he regains the estate by redemption, which he may do, simply by payment of his actual debt. The general rule of the common law, therefore, that what is fixed to the freehold, becomes part of the realty, and passes with it, has its full effect, in regard to things erected on the land by an owner, who subsequently mortgages the land, and also in regard to things erected by the mortgagor after the mortgage."

In the case of Greame *vs.* Cullen et. al., 23 Grattan, 266, the Court of Appeals of Virginia uses this language:

"All buildings and other improvements and fixtures put upon mortgaged premises by the mortgagor, after the execution of the mortgage, become a part of the freehold, and inure as such to the benefit of the mortgagee. There are a great many authorities on this subject, but no conflict among them. All affirm or recognize the principle just stated. It is, perhaps, nowhere more clearly stated than by Chief Justice Shaw, in the case of Butler's Adms. *vs.* Page, 7 Metc. R. 40, referred to in the opinion of the chancellor in this case."

The second paragraph of the syllabus of that case recites that—

"the house on the lot in a city conveyed in trust is burned down, and the grantor in the deed employs workmen to build another house, upon an agreement to give them a lien upon the lot and house for the cost of the building. The workmen are not informed of the first lien until they have nearly completed the work, though it was duly

recorded. The whole property is subject to satisfy the first lien."

"Improvements made with the consent of the owner, upon land subject to a mortgage, by one who has notice of it, become subject to the mortgage in the same manner as if they had been made by the mortgagor himself."

1 Jones on Mortgages, sec. 681, and cases cited.

No authority need be cited to the effect that the deed of trust in question is in legal effect a mortgage.

Although there was no house upon the land mentioned in the deed of trust to Warner and Wine, at the time of the execution thereof, there is no doubt but these appellants have a lien upon such house. Indeed, when erected it became a part of the land. Why does it not follow that the easements are, also? The easements are a part of the dominant estate and inhere in it, and can not exist or be conveyed separate from it (Moore *vs.* Crose, 43 Ind. 30), and enure to the benefit of the mortgage security upon it. See 10 A. & E. Enc. (2d ed.) 402; Hankey *vs.* Clark, 110 Mass. 262.

In the case last cited the easement was created in favor of the dominant estate, after the execution of the mortgage, and the court held that it enured to the benefit of the mortgage security, and passed by a sale under the mortgage. The court said:

"Incorporeal rights of this description acquired by the mortgagor subsequent to the date of the mortgage, for the permanent improvement of the estate, and annexed by the terms of the conveyance to the realty, may be considered as passing to the mortgagee by the foreclosure, to be exercised by him at his election. There is no reason why incorporeal rights annexed to the realty should not enure to the benefit of the mortgage security in the same manner as improvements

in the nature of fixtures enure (Winslow *vs.* Merchants' Insurance Co., 4 Met. 306, 310). Until foreclosure the mortgage is deemed a lien or charge, subject to which the estate may be conveyed, improved, and in other respects dealt with as the estate of the mortgagor."

The language in the deed to Warner and Wine is—

"together with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises. To have and to hold the said land, premises, and appurtenances unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns."

That language does not mean simply the improvements, ways, easements, etc., which were a part of the estate at the time of the grant, but all that might be placed thereon or created therein at any future time during the life of the mortgage. How can it be maintained that the deed attaches to and includes a portion of the improvements and betterments placed on the estate after the execution of the mortgage, and not all?

Our contention, we think, has been upheld by this court and the Court of Appeals of the District of Columbia, settling the law in this jurisdiction.

In the case of Shepherd *vs.* Pepper, 133 U. S. 622, the facts did not present so strong an equity to the party claiming the benefit of the easement, as in the case at bar. In that case, Shepherd was the owner of a plot of ground upon which he erected a dwelling. In the erection of the dwelling he encroached upon an adjoining lot. He gave two deeds of trust, a first and a second, on

the dwelling. After that he acquired title to the adjoining land upon which his dwelling encroached, and thereafter he gave another deed of trust to one Mrs. Gray on said adjoining ground. When the matter came before the court of equity to determine the rights of all parties concerned, the court there sustained the contention that the parties secured by the deeds of trust executed prior to that of Mrs. Gray, and prior, even, to the mortgagor's acquisition of the adjoining land upon which his building encroached, should be entitled to the benefit of the easement over that land, although, according to the record, she held the first encumbrance upon that parcel.

In the case of Frizzell *vs.* Murphy, 19 App. D. C. 440, where the facts were similar to those in the case at bar, it was held that where the owner of two adjoining lots, having built a house on each, one of which is so built that its second story projects over the adjoining lot 3 or 4 feet, conveys the lot on which such house stands, with the improvements, easements, rights, and privileges thereto appertaining, neither he, nor any one claiming under him, can thereafter successfully assert a claim to have the projection removed, nor maintain an action against the owner thereof as for a nuisance.

In the case of Janes *vs.* Jenkins, 34 Md. 1, the syllabus recites—

> "that wherever an owner has created and annexed peculiar qualities and incidents to different parts of his estate (and it matters not whether it be done by himself, or his tenant by his authority), so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or the supply of light and air, or for means of access, or for beneficial use and occupation, and he grants the part to which such incidents are annexed, those incidents thus plainly attached to the part granted, and to which another part is made servient, will pass to the grantee as accessorial to the beneficial use and enjoyment of the land."

It cannot be seriously disputed, in view of the facts in this case, that an easement in the 10-foot strip adjoining the Victoria Flats is essential to the reasonable use and enjoyment of the building.

The doctrine that an implied grant of an easement will be sustained in cases of necessity has received recognition, by the great weight of authority, both in the United States and England. And while it is true that many courts have refused to apply the principle to cases before them, because the facts of those cases did not require its application, it is equally true that they have, almost without exception, asserted the *principle* to be as above.

In Evans *vs.* Dana, 7 Rhode Island, 306, where the question was whether an easement existed in a well, the court said:

> "An easement can not arise by implication from an express grant, unless there be some circumstances connected with the grant, or the estate granted, which show that the easement is *necessary* to the enjoyment of the estate granted, or to its proper enjoyment. Whether the right is necessary to the proper enjoyment of the estate, is a question often complex and difficult of solution; the principle, however, is settled, and the difficulty arises only in its application."

The following language appears in Washburn's Easements and Servitudes (4th ed.), 664:

> "So far, therefore, as weight of authority, both English and American, goes, it would seem that, if one sell a house, the light *necessary* for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant land would pass as incident to the dwelling house, *because necessary to the enjoyment thereof.*"

In the case of Powell *vs.* Sims, 5 West Virginia, 1, at page 635, this single question of an implied grant of an easement was involved, and the court said:

> "The prevailing doctrine here would seem to be that an implied grant of an easement of light will be sustained only in cases of real and obvious necessity, and will be denied or rejected in cases when it appears that the owner of the dominant estate can, at a reasonable cost and expenditure, have or substitute other lights to his building, so that he may continue and have the reasonable enjoyment of the same." . . .
>
> "This rule, it appears to me, is dictated by wisdom and sound policy, and sustained by the plainest principles of justice and equity, and ought therefore to be applied and enforced in this country."

The ruling in this case was followed in Turner *vs.* Thompson, 58 Ga. 268.

In Rennyson's Appeal, 94 Pa. State, 147, the court, after reviewing other cases on this subject, said:

> "It is worthy of remark, however, that this case (i. e. Turner *vs.* Thompson, 58 Ga. 264; 24 Am. Rep. 497), limits the general application of Keats *vs.* Hugo as between dominant and servient tenements in one important respect. I think the limitation is wise and right. It is that an implied easement of light and air will be sustained in case of *real necessity*."

In the case of Sutphen *vs.* Therkelson, 38 N. J. Eq 318, which was a suit brought to restrain defendant from erecting a building on his lot which would exclude light and air from complainant's building, the court said:

> "The doctrine which is to govern this case rests not on user, but on an implication of grant or covenant, and on the principle that a man can not be permitted to derogate from his own grant. To the

> suggestion always made in cases of this kind, in opposition to the application of the doctrine in reference to city, town, or village property, that the enforcement of the privilege will greatly impair and perhaps practically destroy the value of the defendant's lot, it is enough to say that the law demands the application, and it is therefore the right of the complainant to have it made."

In Whiting *vs.* Olney et al., 3 Mason, 280, Mr. Justice Story, speaking of this principle, said:

> "The good sense of the doctrine on this subject is, that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment included in it, passes to the grantee."

This principle of law is based upon the maxims that no man shall derogate from his own grant, and whoever grants the same shall be understood to grant, also, whatever is indispensable to the full beneficial enjoyment of it.

The appellants, we submit, are supported in their contention that the implied grant of an easement will be sustained, in cases of necessity, by the following authorities:

Rosewell *vs.* Pryor, 6 Mod. 116.
Palmer *vs.* Fletcher, 1 Lev. 122.
Buss *vs.* Dyer, 125 Mass. 287.
Collier *vs.* Pierce, 7 Gray, 18.
Story *vs.* Odin, 12 Mass. 157.
Ins. Co. *vs.* Patterson, 103 Ind. 582.
Lampman *vs.* Milks, 21 N. Y. 505.
Smyles *vs.* Hastings, 22 N. Y. 217.
Clawson *vs.* Primrose, 4 Del. Ch. 643.
Cave *vs.* Crafts, 53 Cal. 135.
Ray *vs.* Sweeney, 14 Bush. (Ky.) 1.
Bank of British North America *vs.* Miller et al, 6 Fed. 545.

And Mr. Chief Justice Alvey, in delivering the opinion of the court below in the case at bar, said:

> "It being a well settled rule of construction that the grant of a principal thing shall be held to carry with it all that is reasonably necessary for the enjoyment of the thing granted, for the purpose for which, according to the obvious intent of the parties, the grant was made, and that a grant is always to be taken strongly against the grantor, it would appear that the right to light and air would pass upon the conveyance of the building, under the circumstances, by the grant itself, where, as in this case, light and air is apparently necessary, even without any special words of conveyance. Pomfret *vs.* Ricroft, 1 Sand. 320, and notes; Blackisley *vs.* Whieldon, 1 Hare, 176, 180. But, without deeming it necessary to apply the principle as thus broadly stated, the deed of trust to Grayson and Heald, by express terms, not only recognizes the existence *de facto*, but the user, of easements of ways, *rights, and privileges, as appurtenant* to the said building. This is the clear import of the deed of trust. It is true, the deed, by its terms, does not limit the extent of the right of easement of light and air over the adjoining ground on the south and west sides of the building, but the acts and dealings with the subject by Haller, Wood, and Talbott, would clearly indicate that they found it necessary that a strip or space 10 feet wide on the south and west sides of the Victoria Flats building was reasonably necessary to supply the light and air to the rooms and apartments on those sides of the building. It is competent to arrive at the necessary extent of the space or area by what the parties have done in regard to it, and what they have recognized as reasonably necessary in actual use. Hall *vs.* Lund, 1 Hurl. & Colt, 676, 683."

The language employed in the Warner and Wine trust is identical with that in the Grayson and Heald trust.

In the case of Sheets *vs.* Selden's Lessee, 2 Wall. 177, where a similar question was raised, Mr. Justice Field said, at page 187:

> "The true rule on the subject is that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance. Thus the devise of a mill and its appurtenances was held by Mr. Justice Story to pass to the devisee, not merely the building, but all the land under the mill and necessary for its use, and commonly used with it. So a conveyance of a certain tenement, being one-half of a corn mill situated on a designated lot, 'with all the privileges and appurtenances,' was held by the Supreme Court of New Hampshire to pass not only the mill, but the land on which it was situated, together with such portion of the water privilege as was essential to its use."

See, also—

New Ipswith Factory *vs.* Batchelder, 3 N. H. 190
Rogers *vs.* Sinsheimer, 50 N. Y. 646.

In the case of Havens *vs.* Klien, 51 How. Pr. N. Y., p. 82, the facts of which were analagous to those in the case at bar, where a common owner of two tenements, the windows of one of which overlooked the yard of the other, receiving light and air therefrom, its shutters swinging out over such yard, and access from its fire-escapes which overhung the yard being had to such yard, severs the same by conveyances to different persons, it was held that an easement in favor of the tenement so overlooking the other was created in respect to light and air, the swinging of the shutters, and access to and from the fire-escapes, and further that it was immaterial whether such severance was by deed or mortgage, inasmuch as by foreclosure the mortgage ripened into a deed.

In Seibert *vs.* Levan, 8 Pa. St. 383, in an opinion by Mr. Chief Justice Gibson, it was held:

> "If one annexes peculiar qualities to his land, the alteration being palpable and manifest, a purchaser will take the land burthened or benefited, as the case may be, by the quality annexed to it."
>
> Reiner *vs.* Young, 38 Hun. 335.

In the case of Grace Church *vs.* Dobbins, 153 Pa. St. 294, where a bill was filed to compel the removal of a cornice from a building, the court, in reversing a decree in favor of complainant, said:

> "Where an owner of land subjects part of it to an open, visible, permanent, and continuous service or easement in favor of another part, and then aliens either, the purchaser takes subject to the burden or benefit, as the case may be. This is the general rule founded on the principle that a man shall not derogate from his own grant." Citing authorities.

In the case of United States *vs.* Appleton, 1 Sumner 492, Mr. Justice Story well remarks:

> "In the construction of grants, the court ought to take into consideration *the circumstances attendant upon the transaction*, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties."

It would be inequitable, under the facts of this case, to deny the parties secured by the deed of trust to Warner and Wine the benefit of the easements. It was understood at the time of the loan, that a building, with doors and windows for the admission of light and air on all sides and approaches over the cement walks and through the areaways to the cellars and garbage chutes, and space for the eaves, roof, and porches of the building, would

be constructed with the money advanced and secured by the trust to Warner and Wine.

The effect of the decree below is to deny to the parties, secured by the trust in question, a portion of the security which, it was understood, they were to have at the time of the loan.

It is respectfully submitted that the deed of trust to Warner and Wine is a lien on the entire property as it stands, including the easements, prior to that of Heald and Grayson, and that the decree should be corrected accordingly, and as corrected, affirmed. As we understand the brief of counsel for appellees, Grayson and others, they do not object to this, and, the easements being declared and established, we do not see how this suggested correction in the decree could prejudice the interests of any other parties to the suit.

Respectfully submitted,

B. W. PARKER,

R. GOLDEN DONALDSON,

Solicitors for Warner and Wine, Trustees, et al.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. ~~358~~ 89.

BRAINARD H. WARNER AND LOUIS D. WINE, TRUSTEES; FRANK L. FREEMAN, LAURA R. GRAY AND JAMES P. LOWE, APPELLANTS,

vs.

DAVID C. GRAYSON, TRUSTEE; MICHAEL SHEA, WILLIAM J. McCLURE, ET AL.

No. ~~359~~ 90.

H. MAURICE TALBOTT AND FRANK I. WOOD, APPELLANTS,

vs.

DAVID C. GRAYSON, TRUSTEE; MICHAEL SHEA, WILLIAM J. McGUIRE, ET AL.

BRIEF SUBMITTED ON BEHALF OF APPELLANTS, WOOD AND TALBOTT.

JOHN RIDOUT,
CHARLES F. CARUSI,
Attorneys for Wood and Talbott, Appellees in No. 358 and for Appellants in No. 359.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 358.

BRAINARD H. WARNER AND LOUIS D. WINE, TRUSTEES; FRANK L. FREEMAN, LAURA R. GRAY AND JAMES P. LOWE, APPELLANTS,

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vs.

DAVID C. GRAYSON, TRUSTEE; MICHAEL SHEA, WILLIAM J. McGUIRE, ET AL.

BRIEF SUBMITTED ON BEHALF OF APPELLANTS, WOOD AND TALBOTT.

This is an appeal from the decisions of the Court of Appeals of the District of Columbia, rendered October 6th, 1903, and May 24th, 1904. The latter decision is a merely formal affirmance of a final and modified decree entered November 30th, 1903, in accordance with the mandate of the Court of Appeals of October 6th, 1903.

Assignment of Errors.

I. The Court erred in holding that the appellees are entitled to an easement for light and air over the land of the appellants.

II. The Court erred in leaving to the discretion of the trustees appointed by it the right to sell as a whole the land covered by the Victoria Flats and the adjoining land owned by the appellants.

The facts found in its opinion by the Court below to be either *material* or *proven* are few in number. Likewise in its opinion of October 6th, 1903, the Court of Appeals so correctly states the substance of the record in a way manifestly so fair to both parties that these appellants, were they assured that the learned counsel for the appellees would likewise refrain from attempting to go behind the findings of the Court of Appeals, would, without further preliminaries, address themselves to the several questions of law involved in the decisions of the lower court.

In default of this assurance, they make the following

Statement of Facts.

This case, it is believed, will turn principally, if not wholly, upon the propositions of law decided by the lower court. About the facts there is little or no room for controversy or dispute in the record, though counsel differ widely with respect to some of them in the briefs heretofore filed.

In view of this always regrettable circumstance, we will again endeavor not merely to state the facts with accuracy, but to verify each statement of any material fact or circumstance or inference by page reference to the record.

On the *13th day of January, 1897,* Alice S. Hill, who was the owner, conveyed in fee to Nicholas T. Haller, lots one and two, block forty-five, in Hill's subdivision, of middle grounds of Columbian University, fronting one hundred and fifty feet on 14th Street extended, and one hundred and ninety feet on Welling Place; on *January 22, 1897,* Haller executed a deed of trust to McReynolds and Merriwether to secure $12,000, part of the purchase money to said Hill; for convenience this trust will hereafter be referred to as the McReynolds Trust. It covered a front of 30 feet on 14th Street and 66 feet on Welling Place.

On the *22d day of January, 1897,* Haller executed a deed of trust to Warner and Wine to secure $75,000, represented by 118 notes to sundry persons; this trust will hereafter be referred to as the Warner Trust; it covered a front of 120 feet on 14th Street and of 124 feet on Welling Place. When these two trusts were executed and recorded there were *no improvements* of any kind upon the land. Haller then erected an apartment house known as the Victoria Flats. (Record, pp. 1 to 12.)

He had originally intended to locate it well within the lines of the Warner trust, but owing to a message from Mr. Justice Harlan, calling his attention to certain building restrictions in one of the prior deeds to the land, he changed the location so that the south and west lines of the building were practically coincident with the lines of Warner's Trust (Record, p. 47). Certain area ways on the first floor and porches on the upper floors on the south side project about 4 feet six inches beyond the line of the Warner trust.

There are windows in both the south and west sides looking out over the appellant's land, as described in the McReynold's Trust. There are also the usual recesses

for light and ventilation on the south and west sides of the building.

When the building was substantially completed, *in December, 1897,* Haller executed the deed of trust to Grayson and Heald, under which the appellees claim. The deed of trust was drawn up by Mr. John C. Heald, of the local bar, and signed by Haller. (Record, p. 43.) This will hereafter be designated as the Grayson Trust. This conveys by the *same description* as the Warner Trust. (Record, p. 174.)

This trust was given to secure material men who had contributed material to the erection of the building. Afterwards, for the purpose, as he expressed it, of "blanketing the thing up" (R., p. 20), Haller executed a trust to Sebring and Holt, purporting to secure $31,000 to McClure and Roome. This will be designated as the Sebring Trust. It was wholly without consideration.

THEREAFTER, and after the trust to the appellees, Wood purchased from Haller an undivided half interest in the Victoria Flats property, and an adjacent 10 feet on the south and west sides, paying therefor by conveying Wood's equity of redemption in certain Washington City real estate, valued at $20,000, *i. e.*, which netted Haller $20,000 in a subsequent trade. (Rec., p. 110.) It is true that the equity was subsequently wiped out by a foreclosure sale, but not until Haller had realized $20,000 by the exchange. (Rec., p. 110.) The Sebring trust was not executed at the instance nor with the knowledge of either Wood or Talbott, and when its existence was ascertained they insisted upon and procured its release (R., p. 67).

Wood discovered after his purchase, but before conveyance, that the building was located, as above stated, and when Haller made conveyance to Duke to hold as

trustee for him and Wood, the latter, for his protection, required the inclusion in the conveyance of ten feet additional on the south and west sides of the building (R., page 20). Thereafter Talbott purchased Haller's one-half interest in the building, and *Wood and Talbott purchased all Haller's interest in the adjoining vacant ground, each paying the price in money.* It was only because of said requirement that the 10-foot strip on the south and west sides of the Victoria was included in the deed from Haller to Duke. Wood required this for his own benefit; afterwards when Wood and Talbott had become owners of the whole property they caused the ten feet to be reunited to the vacant property.

Wood successfully conducted the hotel for a time, but appellants found that it would not be possible to meet the exorbitant charges of interest out of the revenue from the Victoria. They thereupon made inquiries to ascertain what could be done in the direction of refunding the debt. They ascertained that probably $100,000 at most could be borrowed (R., p. 29).

This made it imperative that some reduction should be made in the amount of existing encumbrances. Thereupon they made inquiries (called threats by the appellees) of the respective holders of notes under the Grayson trust, and while some were reasonable in their demands, the attitude of Grayson in demanding immediate payment of practically the whole of the notes held by him, defeated the plan of refunding the debts secured by the Warner and Grayson trusts. (R., p. 29.)

Thereafter interest on the Warner trust fell due, was not paid, and sale for that default was threatened. Wood and Talbott saw Grayson, who acted as the representative of those claiming under Grayson trust, and informed him that the funds in Wood's hands were not sufficient to pay the interest. Grayson demanded that

what Wood had should be paid to him (Grayson), but refused to say what disposition he would make of it if Warner refused to receive it. (R., p. 30.)

The notes secured by Warner trust, being 118 in number, it was not possible to make a partial payment on account of interest. Wood took advice of counsel, and was advised not to pay over any money unless assured it would be accepted and duly credited, and the threatened sale averted. Such an assurance could not be obtained.

Afterwards, having heard that Grayson was claiming for his trust certain easements over ten feet of the vacant land south and west of the Victoria, Wood and Talbott, by advice of counsel, in order to negative in the most public and emphatic manner the validity of such claim, filed the bill against Duke found in the record. Warner and Wine advertised the property for sale under their trust. (Record, p. 57.)

The bill in this cause was filed, an injunction against sale was granted and receiver appointed. From the latter action appeal was taken by Wood and Talbott, and the order was affirmed, the main questions being by the opinion expressly reserved. Answers were filed, proof was taken, and final decree was passed, which, as modified, adjudges in substance:

Brainard H. Warner, Frederick W. McReynolds and David C. Grayson are appointed trustees. They are authorized to sell the property *as a whole* or in parcels. In the latter case they are to offer as one parcel the Victoria Flats building, with an easement for light and air over a strip of land along the west and south sides thereof *ten feet in width.* They shall sell the residue in such parcels as they deem most advantageous, so far as necessary to pay what is due on the said trusts respectively, with costs of sale.

The *porches* which project over the adjoining land, and the *cement walk*, are apparently to be sold as part of the building. If there is any evidence establishing their *necessity* to the profitable conduct of the Flats, as distinguished from mere convenience, we concede that under Frizzel *v.* Murphy, the Court was justified in so much of the injunction as covered them.

The burden of showing this necessity is, however, upon the appellees, and they do not appear to have succeeded in carrying it.

Analysis of the Record.

Bacon has aptly said: "Truth comes easier out of error than out of confusion." Upon analyzing the bill, which, by a noteworthy *inversion* of the *chronological* order of events, makes out a case wholly unsupported by the proofs, the main reliance is seen to be placed:

(a) Upon a "known plan" to build the hotel or flats in such wise as to leave a ten-foot strip adjoining the south and west sides.

(b) An agreement by Haller *with* the appellees or *for their benefit* to obtain a release of a ten-foot strip for this purpose, the "known plan" becoming impracticable by some building regulation.

(c) The fraudulent behavior, "not to be characterized by an epithet" of the appellants, who had notice of the "known plan" and of the agreement by Haller with the appellees to give them ten feet additional; in that they secured the ten feet for their own use, that, instead of taking title directly in themselves, they made use of a tool, one Duke, who held the title for them under a declaration of trust, their fraudulent conduct in trying to buy up notes, making threats, and, in general, their obvious intention of making the appellees pay as high price as possible for the adjoining land.

1. The deed of trust to Grayson & Heald (under which appellees claim) was made *December 20th, 1897.* (Record, pp. 32, 33.)

Wod got his deed of the Flats property *July 31st, 1898.* (Record, p. 33.)

Wood got his deed of the ten-foot strip (created thus for the first time as a *separate* subject-matter of dispute) *March 13th, 1899.* (Record, p. 33.)

Talbott acquired his interest *April 1st, 1899.* (Record, p. 64.)

It thus appears that Wood became interested in the property in controversy after Grayson & Heald had their deed of trust, and Talbott became interested still later.

Whatever rights, whether to the land actually conveyed to them by the deeds of trust or to the adjoining land, either the holders under the first or second trusts can now have, must have been such as they acquired at the date of their respective deeds, or on account of previous facts which might have given rise to some equity in their favor. And in this connection it is immaterial whether they limit their claim to the corpus of land not covered by their deeds or to an easement over all or a portion of the adjoining land, or whether they claim an equity for the reformation of their deeds of trust, or for specific performance of an alleged agreement to grant an easement, no *Subsequent fact* can increase or diminish or otherwise affect their interest so created, or have any relevancy to this suit except as tending to prove or disprove the existence of some fact prior to said deeds of trust.

Now it is obvious that had Haller been guilty of these alleged fraudulent practices after December 20th, 1897, they would become material as *indicia* of a pre-existing scheme or plan or program on Haller's part by which he was to cheat his creditors.

But how Haller's *previous* conduct can be affected by his *grantee's* subsequent behavior is not apparent, unless they were in collusion. Now of this there is not even a suspicion in the record; counsel have never even hinted it in argument; the trial justice expressly "acquits" him of such misbehavior; and, the fact is, Haller, who is an architect and builder, and dependent upon material men and money-lenders for his livelihood, obviously has joined forces with his creditors against his grantees, furnished the former with documentary evidence of various kinds, and, in taking the stand in their behalf, has sworn to everything he conscientiously could swear to.

It must be quite evident, then, that all the events after December, 1897, including the alleged fraudulent practices of the appellants, are, as the Court of Appeals in its opinion has regarded them, of no materiality whatever.

2. Now as to the "known plan" to build the hotel or flats in such wise as to leave a ten-foot strip on the south and west sides.

Known to whom?

Certainly not to Warner & Wine, or their *cestui qui trustent.*

If so, their counsel was derelict in not putting them on the stand, a charge from which we freely acquit him.

Known to Grayson & Heald or their *cestui qui trustent?* Three witnesses were called upon this point. Mr. Grayson, one of the trustees and principal creditors, who testified that he had no knowledge whatever that the Victoria Flats building was not fully comprised within the ground specified in that deed, he "never had any suspicion or any intimation otherwise"; his understanding and belief was "that the entire ground belonged to Mr. Haller; and I did not know anything about the dimensions of the building at all." (Record, p. 35.)

Not a word about any "known plan" in Mr. Grayson's testimony.

Mr. John C. Heald, one of our well-known lawyers, the other trustee, and a creditor to the extent of ten thousand dollars, *prepared* the deed of trust of December 20th, 1897. Counsel was careful not to ask him anything about any "known plan," or what representations, if any, Haller or anyone else had made to him, nor what his "knowledge, suspicions, intimations and beliefs" were. (Record, pp. 43, 44.)

So much for the trustees themselves, and the one who prepared the trust.

Mr. Zellers, who was questioned in the same leading and suspiciously negative way, says: "We had not the least idea that the flats was on any other ground than what belonged to it," and, by belonging to it, he meant "the *plats* that was laid out to put the building on." (Record, pp. 41, 42.)

Still nothing about any "known plan" to have ten feet around the building. The plat Mr. Zellers refers to is difficult of identification, for, singularly enough, counsel forgot to offer it in evidence.

Mr. McClure, the last and the only witness who approximates in his testimony any "known plan," says:

> "Q. At the time you accepted these second trust notes what knowledge or information had you that the ground described in the second trust did not enclose all the ground that the Victoria Flats was built upon or extended over?
>
> "A. I always *understood* that there was ten feet of ground laid outside the building for an air space. I built the areaways there with the *understanding* that the building owned the ground.
>
> "Q. What was your understanding or belief that the deed of trust covered that ten feet?
>
> "A. I always understood that the deed of trust covered the ten feet front all around the building." (Record, pp. 40, 41.)

In this skeptical age Mr. McClure's faith is childlike and very beautiful, the more so that it was spontaneous and uncaused. He understood there was ten feet reserved, and that the deed of trust his attorney, Mr. John C. Heald, drew, covered it.

Why he understood he does not say; he is reticent about plans and plats, known or otherwise; and, above all, he, like every other of the appellees' witnesses, neglects to say that he was misled by Haller or by anyone else, or that he enjoyed anything more robust and positive than an absence "of understanding, suspicion, intimation or belief" about the coincidence of the wall of the flats and the boundary of the deed.

Mr. Haller was the man to clear up all these suspicious intimations and beliefs. His counsel, who called him as a witness, had only to ask him in his usual form:

> "Did you not show the original plans of your building to all or some of these appellants?
>
> "Did you not tell them you intended to reserve ten feet for an air space?
>
> "Did you not intimate that you intended them to have ten feet more ground than Warner & Wine had?
>
> "Did you not tell them that you had made arrangements to secure the release of ten feet to add to the building?"

A single affirmative reply, and the appellant's case was won, not for a mere easement, but the *corpus* of the whole ten feet that Justice Hagner gave them.

The learned counsel for the appellees asked Haller the one question, "Is that building located on the ground on which you intended it to be located when you first prepared the plans?" (Record, p. 47.)

Witness was not even asked what his plans, as first prepared, showed forth. Nor, most significant of all, were these plans offered in evidence.

So much, then, for the "known plan," which does not appear ever to have had any existence, nor to have been made known to anybody, and the only trace of which is to be found in the eloquent briefs and argument of counsel.

And now for the agreement between Haller and the appellees, by which, if they accepted this second trust, he was to secure for their benefit a release of a strip of ten feet on the south and west.

This agreement appears in the first place to have been made February 14th, 1898, two months after the appellants had their deed of trust. (Record, p. 112, f. 250.) How they could have been affected by it is, therefore, very puzzling unless their "beliefs" were retroactive as to time, as well as not precisely limited as to space.

The agreement was not with them at all. It was between Haller & MacReynolds, for the benefit of Early & Lampton's principals. (Record, p. 92, f. 209.) The "agreement" never was an *agreement.* It was an offer which was never accepted at all by *anybody* at *any time.*

It is evident, then, that the "agreement," the "known plan" and the behavior of the appellants, which, content with merely quoting the phrase every minute or two, counsel kindly refrain from "characterizing by an epithet," in modest emulation of the Court below on the appeal from the appointment of a receiver, when practically the only evidence before it was the bill of complaint, are not singly or collectively sufficient to make out any equity in favor of the appellees.

Whether the physical situation of the property at the time appellees took their deed, and about which there is no dispute, or whether the language of the deed of December 20th, 1897, about which there is also no dispute, entitles the appellees to an easement for light and air, are questions of law, pure and simple, and are dealt with in the following portions of this brief.

First, however, let us consider how far the evidence justified the Court below in refusing to reform the deed of trust on the ground of fraud or mutual mistake.

Point I.

A written instrument will not be reformed for mistake or fraud unless clear, positive and convincing evidence be produced showing the existence of such mistake or fraud.

Equity will reform a written contract or other instrument *inter vivos* only where, through mutual mistake, or the mistake of one of the parties, induced or accompanied by the fraud of the other, it does not, as written, truly express the agreement of the parties. But equity will not reform a written instrument unless the mistake is one made by *both* parties to the agreement, or where there is mistake on one side and *fraud* in the other party in taking advantage of that mistake and obtaining a contract with knowledge that the one dealing with him is in error in regard to what are its terms. We admit, subject to the rule requiring the evidence to be clear, positive and convincing, that if in the case of the Grayson trust, both Haller and Grayson intended that the trust should convey more ground than was covered by the description in the deed of trust, there would be an equity for the reformation of that deed of trust as against Haller, so as to include such additional ground as was mutually intended to be conveyed; or if there were any evidence, clear, positive and convincing, that Grayson expected to receive more ground than was covered by his deed of trust, but failed to do so owing to some fraud practiced upon him by Haller, that then, if notice were brought home to these appellants, they being privies in title, would be concluded.

But we submit that, so far from the evidence disclosing any mutual mistake, there is absolutely not a scintilla of such proof, and nowhere has the bill gone so far as to allege that Mr. Haller perpetrated, or attempted to perpetrate, any fraud upon either the Grayson or the Heald trust-holders, and the learned Justice below not only acquits Haller of any fraud, but confusing dates commends him (R., p. 141.) The only testimony taken in behalf of the complainants upon this point was that given by Haller, who was called as their witness, and testified (see R., p. 47) that he moved his building back in obedience to a message from Judge Harlan, notifying him of a building restriction in the Sherman deed of the property, and threatening him with an injunction if he did not re-locate his building.

It certainly cannot be contended, after the building had been once located in its present position, that Grayson and Heald, subsequently taking a deed of trust, were misled by the terms of their deed of trust. As a matter of fact, Mr. Grayson's deposition, which is typical, contains only this statement as to what he was led to believe and as to what he relied upon, outside of the terms of his written deed, *i. e.* (see Record, p. 35), he was led to believe that Haller "owned the adjoining property." As a matter of fact, Haller did at that time own the adjoining property; and, if important at all, Grayson's own testimony shows that he considered such ownership by Haller sufficient guaranty that the adjoining property would never be built upon, if he ever considered anything at all about it, which is highly doubtful. As a matter of fact, Haller, though he did then own the ground, afterwards sold it, a contingency which Mr. Grayson should have considered.

Parol evidence is admissible to show mutual mistake or fraud, as a basis for the reformation of a deed, even where the deed or other written instrument to be reformed is one

which the Statute of Frauds itself requires to be in writing. But, necessarily, the parol evidence by which it is sought to contradict or enlarge the express terms of a written deed of conveyance, which the law requires to be recorded, and of which subsequent purchasers are to take notice, must, to say the least, be reasonably clear and convincing. The law is thus stated by one of the more recent writers on the subject of equity:

> "An instrument will not be reformed on the ground of mistake unless the evidence shows clearly and satisfactorily not only that the writing does not truly express the intention of the parties, *but also what was intended to be expressed, or what the actual contract was.* The courts have stated the rule as to the degree of evidence required for the reformation of a contract in many different ways; but however the rule may be expressed, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the Court that fraud has been committed, or that a mistake has been made. A court of equity, in correcting an agreement of parties upon the ground of mistake, proceeds upon the theory that it does not express their real sense, and so it is most evident; that the mutuality of the mistake must be made out, and the fact of a different agreement having been intended by both established by evidence which is clear and convincing." (See Eaton on Equity, p. 623, and cases cited.)

Argument on the Law.

The questions of law here involved are three in number; the two first deal with the existence of an easement for light and air in favor of the Appellees over the land of the Appellants, and the third deals with the propriety of the decree.

If the first two are answered adversely to the claims of the Appellees, the third becomes unimportant.

These first two questions, by which it is sought to ascertain whether the appellees have acquired an easement for light and air over the appellants' land in the only two ways known to the law, to wit, either by express grant or by implication of law based upon necessity, and the theory that one may not derogate from his own grant, may be thus stated:

1. Is there anything in the language of the deed of trust to Grayson & Wood, even when read in the light of surrounding circumstances, from which an intention to pass an easement of light and air over ten feet of the adjoining property may be inferred?

2. Can an easement for light and air be acquired in the District of Columbia in any other way than by deed of grant, *i. e.*, can it be acquired by mere implication from the physical relation of the land granted to the land reserved?

The Court of Appeals has answered both these questions in the affirmative. That the Court erred, the appellants will try to establish in the following points:

Point II.

No one can have a de facto or any other kind of easement in his *own* land, and there is nothing in the *language* of the deed of trust of December 20th, 1897, or in the attendant circumstances, from which any *intention* to convey more than the land described by metes and bounds and the improvements thereon can be gathered.

The argument of the learned Court below upon this point may, as gathered from the opinion, be thus summarized:

"In the deed of trust to Grayson and Heald the parcels of the two lots as described in the deed of trust to Warner and Wine are granted, 'together with all singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in any wise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise, however, of the party of the first part, of, in, to, or out of the said land and premises."

(Opinion of Alvey, C. J., Record, p. 148.)

"And such being the right and power of Haller (owner in fee of both parcels), the mortgagor, over the divided parcels of the two lots, it was perfectly competent for him not only to make the second deed of trust of the parcel of ground upon which the Victoria Flat building had been erected, but to create and annex to that building a *de facto* easement for light and air, etc."

(Opinion, Record, p. 150.)

"But without deeming it necessary to apply the principle as thus broadly stated (out-and-out doctrine of easement of light and air by implication), the deed of trust to Grayson & Heald, by express terms, not only recognizes the existence *de facto*, but the user, of easements of ways, rights and privileges as appurtenant to the said building. This is the clear import of the deed of trust."

(Opinion, Record, p. 150.)

The use by the Court of the expression *de facto* easement is interesting. The Court holds that it is not necessary for it to hold ("to apply the principle as thus broadly stated") that the appellees acquired a *de jure* easement by *implication of law*, because Haller already had a *de facto* easement in his *own* land, and this the parties must have *intended* to pass under the head of "im-

provements, ways, easements, rights, privileges and appurtenances."

In the first place Haller could not in law have an easement in his own land. When a man walks over his side yard, for instance, it will hardly be said that he creates for himself or for anyone else a *de facto* right of way, nor if he opens a window overlooking his back yard does he create a *de facto* easement for light and air.

> "An easement is a liberty, privilege or advantage, without profit, which the owner of one parcel of land may have in the *lands of another.*" (14 Cyc., 1139.)

Although the phrase is a new one, a *de facto* easement well expresses an advantage without profit which the owner of one parcel of land may in fact, although without legal right, enjoy in the lands of another, such an user, for instance, as might by prescription ripen into an easement.

But to say that one can have a *de facto* easement in one parcel of his land, such as will pass under a deed conveying another parcel, "together with all easements, privileges and advantages thereto appertaining," is not only to create a new doctrine, but one opposed to every precedent, English and American, and to give an entirely new meaning to a technical legal term.

It is true that one may, as an ordinary incident of his ownership of land, make continuous use of a way, for instance, from his manor to the highway, and some writers speak of this as a quasi-easement. (14 Cyc., 1166.)

And it is conceded to be the well-settled law that, in such case, if the owner of the manor conveys it to another, that other acquires an easement *ex necessitate;* a *way of necessity* is created, and the purchaser acquires this easement, *not by the terms of his grant,* not even if the words

"easement appertaining thereto" are used, but he acquires his easement by *implication of law.* The law is well settled that where one is the owner of two tenements, the one dominant with respect to certain servitudes upon the other, and he sells the dominant tenement, the purchaser acquires the easements to which those *apparent and necessary servitudes* correspond.

The point we are now trying to impress upon this Court is, that howsoever correct the Court below may have been in its decision that the appellees acquired an easement for light and air over the adjoining land, they acquired it, if at all, by *implication of law,* and not because Haller had a *de facto* easement in his own land which could have passed under any language in his deeds to Warner & Wine or to Grayson and Heald, or was, in either case, intended so to pass.

What is there in the record to show that Haller or the appellees, or anybody else, conceived that Haller had a de facto easement in the adjoining ground, which he tried expressly to convey to the appellees under this language in his deed?

"The physical situation of the two properties," says the Court below.

This certainly involves a *petitio principii.*

Even the English cases have never gone so far as to give a man an easement by implication in his own land, and then to give it to his grantee under a presumed intention on the part of the grantor that it should pass without appropriate language in his deed, or independently of grant. The English doctrine is that the grantor intended to give as a *new-born* easement certain rights or privileges necessary to the part conveyed, but which he previously had enjoyed by virtue of his common ownership.

This case cannot, then, be decided on the theory that

Haller had a *de facto* easement in his own land which the parties regarded as a pre-existent easement, a thing apart and independent of his ownership of the adjoining ground, and that he intended this supposed pre-existent easement to pass under the language in his deed to Grayson and Heald.

It is true that the language is very broad, and although the description of the corpus of the property by *metes* and *bounds* in this deed of trust, made *after* the Flats were erected, is identical with that used in the deed of trust to Warner & Wine, which was executed *before* any improvements were made, or *de facto* easements created, yet, if in view of the changed situation since the Warner & Wine trust was given, Haller had gone out of his way to use this broad language, of which the Court below in its opinion says,

> "the deed of trust to Grayson & Heald, by express terms, not only recognizes the existence *de facto*, but the user of easements of ways, rights and privileges as appurtenant to the said building.
>
> "This is the clear import of the deed of trust" (Opinion, Record, p. 150),

then we think the Court below would have been quite justified in holding that the easements in question were intended to pass under the *express terms* of the deed of grant.

That no intention to pass any *de facto* easement ever entered into the head of the grantor, who, by the way, did not prepare the deed of trust, is shown conclusively by the following stipulation of counsel (Record, p. 174):

> "It is hereby stipulated, by and between the counsel for Warner & Wine *et al.*, appellants, and Grayson

et al., appellees, that the following language, to wit, 'together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise, however, of the parties of the first part, of, in, to, or out of the said land and premises, to have and to hold the said land, premises and appurtenances unto and to the only use of the parties of the second part, the survivors of them, his heirs and assigns,' *is used in the deed from Nicholas T. Haller to Brainard H. Warner and Louis D. Wine, trustees, referred to in the original bill in said causes, as recorded Liber No.* 2180, *at folio No.* 340 *of the land records of the District of Columbia.*

"And it is further agreed that the stipulation may be used at any future hearing in this cause, in lieu of a copy of said deed."

In concluding this point, therefore, it appears—

(a.) There was not at the time of the Grayson & Heald trust any *de facto* or *de jure* easement belonging to Haller in his own land, or anything that would answer the description in the deed of trust of "easements."

(b.) Certainly neither grantor or grantees had any *de facto* easements whatever in contemplation, or Haller would not have used the identical language (probably a printed form) in his deed to Warner & Wine when the land was unimproved.

(c.) There is absolutely no evidence in the record of any fraud or mistake which would entitle the appellees to a reformation of their deed of trust.

This may perhaps be a hardship upon the appellees, although it is one due primarily to their own negligence, but "hard cases make bad law," and we submit that the Court below erred in its answer to this question.

The notice these appellants, who purchased from Haller, had, was the same notice of the physical situation that Grayson & Heald had. Not themselves being creditors of Grayson & Heald, their legal titles should be weighed and the better prevail, otherwise the hardship is on the vigilant purchaser, whose rights are entitled to quite as much consideration as a negligent incumbrancer.

Point III.

In this District can one acquire an easement for light and air by implication?

It is conceded that the English rule is in favor of extending to easements for *light* and *air* the same doctrine of implied grant that prevails universally with respect to other easements, such as ways of necessity, etc. It is also true that in England, and in one or two of our States, easements for light and air, as well as other kinds of easements, may be acquired by prescription, *i. e.,* the peculiarly English doctrine of ancient lights.

It only remains to be seen whether, in adopting our common law from England, so much at least of it as was applicable to a young and growing country, we adopted the English law of easements as a *whole,* or whether the doctrine that easements for *light* and *air* could be acquired otherwise than by express grant, *i. e.,* by prescription on the one hand, or by implication on the other, has not been advisedly repudiated in every State in this country except, possibly, Maryland.

In the United States the English doctrine of implied easements of *light and air* is repudiated.

According to the English authority, it seems that if

one sell a house the light *necessary* for the reasonable enjoyment whereof is derived from and across adjoining land then belonging to the same owner, the easement of light and air over such vacant lot would pass as incident to the dwelling house, *because necessary to the enjoyment thereof,* but that the law would not carry the doctrine to the securing of such easement as a mere convenience to the granted premises.

See Leech *vs.* Schroeder, L. R., 9 Ch. App., 463.

This doctrine was recognized in certain *dicta* in some of the earlier decisions in this country, but has been recognized when the direct question was before the court in but three cases; these exceptions to the general rule prevailing in this country are found in the decisions of Maryland and New Jersey. (Louisiana not being here considered, the law of that State being based on the Civil Law, not the English Common Law.)

Curiously enough Maryland, which in 1857 peremptorily repudiated the idea that an easement for *light* and *air* could be acquired in that State by *prescription,* on the ground that the English doctrine, when applied to light and air, was entirely unsuited to the needs of a young and growing country (see Cherry *vs.* Stein, 11 Md., 1), held in 1870, in Janes *vs.* Jenkins (34 Md., 1), that such an easement could be acquired by implication of law under certain circumstances. The equal unsuitability to our needs of easements for light and air by implication of law, based on *apparent necessity,* on the one hand, and on continuous, open, notorious and adverse user for the prescriptive period on the other, seems to have been ignored by the learned Judge, Mr. Justice Alvey, who decided Janes *vs.* Jenkins while on the Maryland bench. Again, after refusing, in Cherry *vs.* Stein,

to follow the English cases, the Maryland Court of Appeals, in Janes *vs.* Jenkins, places its chief reliance upon them.

Only two American decisions were cited:

United States *vs.* Appleton, 1 Sumn., 492 (1833).
Lampman *vs.* Milks, 21 N. Y., 505 (1860).

These cases did not themselves involve the doctrine of implied easements for *light* and *air*, and the portion of the opinions referring to light and air were dicta, pure and simple, and dicta, moreover, expressly overruled in the first two cases in their respective States in which such easements were contended for.

It is thus seen that Janes *vs.* Jenkins stands without American support.

It is of value, however, in that the learned Judge who decided Janes *vs.* Jenkins in Maryland foreshadowed therein the theory of *de facto* easements which we afterwards find developed fully in the opinion of the District of Columbia Court of Appeals in the case at bar.

In New Jersey the implied right to light and air over land retained by the grantor was sustained in the cases of—

Sutphen *vs.* Therkelson, 38 N. J. Eq., 318, 1884; and
Greer *vs.* Van Meter, N. J. Eq., 33 Atl. Rep., 794, 1896.

These decisions seem to be based upon the adoption in this State in 1776 of the English common law. The cases cited in support of them were English cases and certain decisions of the New Jersey courts, the latter, however, relating to easements other than those of light

and air. These cases are, therefore, also without American authority and support.

These three cases, therefore, stand as distinctive exceptions to the general American rule that there is no implied grant of light and air over land retained by the grantor upon the severance of an estate.

The early decisions and *dicta* in other States favoring the doctrine of implied easements in light and air over the grantor's other land have been decidedly overruled by later decisions. In fact, there appear to have been no *decisions* in other States in full support of the doctrine, certain other elements being involved in the cases which seem to support the doctrine and upon which rights recognized were more or less dependent.

The following decisions are of this nature, certain *dicta* therein sustaining the doctrine of an implied grant of light and air over the grantor's remaining land, but as the question was not involved or necessary in any of these cases the decisions are of no authority upon the subject:

White *vs.* Bradley, 66 Me., 254, 1876.
Cherry *vs.* Stein, 11 Md., 1, 1857.
Story *vs.* Odin, 12 Mass., 157, 1815.
Thurston *vs.* Hancock, 12 Mass., 220.
Grant *vs.* Chase, 17 Mass., 443, 1821.
United States *vs.* Appleton, 1 Sumn. 492, 1833.
Lampman *vs.* Milks, 21 N. Y., 505, 1860.
Havens *vs.* Klein, 49 How. Prac., 95, 1875.
Maynard *vs.* Esher, 17 Pa. St., 222, 1851.

By carefully noting the distinction between the decision and dicta, it will be observed that the doctrine of an implied right to light and air has had but the slightest recognition in the past, while all the latest and best considered cases are opposed to the doctrine.

In a few cases it has been held that the grant of an easement of light and air over the grantor's other land may be implied if the easement is a real necessity to the reasonable enjoyment of the building granted. But a careful examination of the cases supporting this view discloses the fact that in each one it was found that no necessity existed in that case, so the statements of an implication of the right to the use of light and air arising from necessity exists as mere *dicta*, and are, therefore, of no consequence in establishing such doctrine. See the following cases:

Robinson *vs.* Clapp, 65 Conn. 365, 32 Atl. Rep., 939, 1895.
Turner *vs.* Thompson, 58 Ga. 268, 24 Am. Rep., 497, 1877.
Morrison *vs.* Marquardt, 24 Iowa 35, 92 Am. Dec., 444, 1868.
Colier *vs.* Pierce, 73 Mass. 7 Gray, 18, 1856.
Rennyson's Appeal, 94 Pa. St. 147, 1880.
Powell *vs.* Sims, 5 W. Va. 1, 13 Am. Rep., 629, 1871.

This doctrine of implication from necessity seems, therefore, to have existed in this country as a theory in the minds of some judges rather than as a rule of law.

It may be stated, therefore, as in accordance with the principles applied to our developing and improving country, and with the leading decisions in the most recent and carefully considered cases, that there is no implied grant of the right to light and air over the grantor's other land adjoining the land conveyed.

The following decisions fully sustain this position:

California—1898, Kennedy *vs.* Burnap, 52 Pac. Rep., 843.
District of Columbia—1903, Hutchins *vs.* Munn, 22 D. C. App. 88.

Indiana—1875, Keiper *vs.* Klein, 51 Ind. 316.
Massachusetts—1872, Randall *vs.* Sanderson, 111 Mass. 114.
Massachusetts—1874, Keats *vs.* Hugo, 115 Mass., 204.
New York—1849, Palmer *vs.* Wetmore, 2 Sandf., 316.
New York—1851, Meyers *vs.* Gemmel, 10 Barb., 537.
New York—1877, Shipman *vs.* Beers, 2 Abb. N. C., 435.
Ohio—1869, Mullen *vs.* Stricker, 19 Ohio St. 135, 2 Am. Rep., 379.
Pennsylvania—1859, Haverstick *vs.* Sipe, 33 Pa. St., 378.

The six decisions cited, page 26, of this brief, so far as the cases under consideration and decided extend, also sustain this position though qualified by what was mere *dicta*.

The doctrine of an implied grant of an easement over the land retained by the grantor rests upon the maxim that a grantor cannot be allowed to derogate from his own grant, and that he is presumed to convey with the land granted whatever rights are necessary for the reasonable enjoyment of the thing conveyed, so far as the grantor has such rights in his possession.

The reasons against applying such doctrine to a right to light and air are well stated in the following decisions:

Bronson, *J.*, in delivering the opinion of the court, in the case of Parker *vs.* Foote (19 Wend., 309, 1838), said:

> "In the cases relating to *ways, commons, markets, watercourses* and the like, where the user or enjoinment, if not rightful, has been an immediate and con-

tinuing injury to the person against whom the prescription is made. His property has either been invaded or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in case of *windows* overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy."

Biddle, *J.*, in delivering the opinion of the court, in the case of Stein *vs.* Hauck (56 Ind., 65, 1877), said:

"An easement in light and air is unlike any other easement known to the law. It is neither an *appurtenance* nor a hereditament. No definition of property known to the law includes it specifically. No exclusive right can be had in the light or air; legislation cannot create such a right, because man has no exclusive domination over them. They are for all in common. To give a right of property in light or air, which can control the right to the use of land, is to make the incident greater than the principal, and allow the shadow to control the substance."

The reasons against implied rights to light and air are well stated by Chief Justice Gray, in the case of Keats *vs.* Hugo (115 Mass., 204, 215, 15 Am. Rep., 80, 1874), as follows:

"By nature, air and light do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land is created, not by the relative situation of that lot to the surround-lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor, indeed, any use of them which can be made the sub-

ject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroaches upon his rights, and cannot, therefore, be presumed to have assented to any such encroachment. *The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned* by one man than where the owners are different. * * *

"The reasons upon which it has been held that no grant of a right to light and air can be implied from any length of continuous enjoyment are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed."

Chief Justice Dillon, in the case of Morrison *vs.* Marquardt (24 Iowa, 35, 60; 92 Am. Dec., 444, 1868), said:

"As to light and air, I am free to say that I do not believe the rule, as applied to our situation and circumstances, a sound one, which holds that under any circumstances this right can, by implication, be burdened upon an adjoining estate, so as to prevent the owner thereof from building upon or improving it as he pleases.

"Surely, such an easement, uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates and laying an em-

bargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy—surely, such an easement should not be held to exist by mere implication, when such implication originates in no reasonable necessity."

Welch, *J.*, in delivering the opinion of the court, in the case of Mullen *vs.* Stricker (19 Ohio St., 135; 2 Am. Rep., 379, 1869), said:

"What we hold is, that the law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another in any case.

"In our view, therefore, the law of the present case is not in the least varied by the fact that the dominant estate was conveyed first, or by the fact that both lots were sold at the same time. It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the kindred doctrine of 'ancient windows,' or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community.

"Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary buildings, the application of the doctrine would be attended with great uncertainty and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual incumbrance upon the servient estate and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good to leave the parties, on ques-

> tions of light and air, to the boundary lines they name and the terms they express in their deeds and contracts."

It seems to be the established policy of the law in this country that the extent of the dominion of the owner of land is within the boundaries indicated by his deed, and within this prescribed, determined, ascertained limitation, each owner has the unlimited right to build as he pleases, and no owner has any control or dominion over the land beyond his boundaries, except in the case of ways of necessity.

Is there any principle of justice for the person who purchases a certain described tract of land to claim the use of certain other ground for the benefit of a building situated thereon? Had he desired more land or the privilege of additional land to that conveyed he should have stipulated therefor in connection with his purchase or afterwards. After bargaining for so much land, can he say to the grantor, "You have granted so much, for which I have paid you; now, I demand the use of other land of yours without compensation; I demand that you make no use of a certain portion of your own land, but shall continually reserve the same for my benefit."

It is contrary to the policy of the law in this country to prevent the improvement of lands by any implied rights of adjacent owners. The principle underlying our recording acts is that rights to and dominion over land is to be determined from that which is expressly granted, that which is expressed in the deed and recorded in the land records, and that the full extent of the right to or interest in lands can be determined from such records, with nothing left to implication. When the records show that the ownership of a certain defined tract of land is in a certain person, he, himself, or whoever acquires his title, is not to be hindered or prevented

from improving the same to its full extent by some implied right or claim. The record must be controlling and all rights or interest in land must rest upon express contract. This is in accordance with the spirit of our institutions and has been adopted as a part of the common law of this country as fully as the doctrine of implied rights has been in England.

"Notice" as to rights in lands, in this country, means that recorded notice which is placed on the public records that all may be aware from what is expressed, the extent and limitation of rights and interests in lands.

The principle that the records govern, not from the date of transactions, but from the time of entering for record, implies that the public record is the basis for determining the rights and interest in lands, and is contrary or opposed to any rights arising or resulting from implication.

It may, therefore, be safely asserted that the law of this country, according to the latest and best considered decisions, is that an easement of light and air can exist only by express contract or agreement, and never by implication.

Such, also, was the rule recognized in this District until the decision of the case at bar.

In the case of Hutchins *vs.* Munn, decided by the Court below, May 6th, 1903 (*22* App. D. C., p. 88), the Court, at page 101, uses this language:

> "It would seem that by the weight of American authority one who erects a house upon a lot belonging to him, with windows overlooking an adjoining vacant lot and receiving light and air across the same, and then conveys to another, is not thereby precluded from building on the adjoining lot, whether before owned or subsequently acquired, in such way as to intercept the passage of air and light through said windows.

> Keats *vs.* Hugo, 115 Mass., 204; 15 Am. Rep., 80; Cherry *vs.* Stein, 11 Md., 1, 24; 19 Am. and Eng. Ency. Law, p. 115. The foregoing doctrine is not, however, involved in this case, and is referred to merely by way of illustration."

Also on the same page of the opinion (p. 101) the Court says:

> "The authorities in this country are practically unanimous in holding that no easement can be thus (by prescription) acquired. 19 Am. and Eng. Ency. Law, p. 118."

Our lower Court itself, therefore, had joined in the general repudiation of the English doctrine that easements for light and air could be acquired by *implication* or by prescription, or in any other way than by express grant.

To give the appellees in the case at bar an easement for light and air, the Court was, therefore, obliged to invoke the novel theory of *de facto* easements.

That theory has been fully criticised under *Point II.* of this brief, and the inaptness of the language used in the deed of December, 1897, and the other circumstances (to wit, the use of the same language in the Warner & Wine trust), negativing any such intention, have been clearly shown.

In conclusion, it must not be overlooked that the law favors the alienation of real as well as personal property; that the recording acts, coupled with the Statute of Frauds, have made it as easy and safe to buy and sell real estate as any other commodity; that large transactions take place through agents in cases where the purchaser never inspects his purchase, relying upon location and general description for values and title companies for titles. Establish here, then, this doctrine of *de*

facto easements, or easements of *light* and *air* by *implication*, and no one is safe in purchasing without an inspection of his purchase, and without looking into the history of every adjoining parcel of land or house, within the light and air radius, to make sure there are no *de facto* easements lurking in the background.

Point IV.

Does the case of Shepherd *vs.* Pepper (133 U. S., 626) justify the decree in this case?

The learned Court below says, in its opinion (Record, p. 150):

> "This case would seem to be clearly within the principle of the decision of the Supreme Court of the United States, in the case of Shepherd *vs.* Pepper, 133 U. S., 626, 650."

This must clearly refer to the overhanging roof, and not to the easement for light and air, because, as the Court says—

> "The improvements and easements in question were visibly necessary for the dwelling house as then constructed, and were visibly upon, or required for the use of Sub. lot A."
> (Record, p. 152.)

The improvements referred to were of a tangible kind consisting, in fact, of part of a *dwelling house*.

The doctrine of implied easements for other things than *light* and *air* was recognized by the Court below in

> Frizzell *vs.* Murphy, 19 App. D. C., 440.

The Court below could not, therefore, have cited either Shepherd *vs.* Pepper or Frizzel *vs.* Murphy as

authority for the proposition that an easement for light and air could be acquired in this District by implication of law; that is to say, because apparently necessary to the enjoyment of the land granted.

The language used in Hutchins *vs.* Munn completely negatives any such suggestion.

Shepherd *vs.* Pepper was evidently intended as authority for so much of the decree as dealt with the overhanging eaves of the Flats and for the method hit upon for having the property sold as a whole. This case was relied upon by Justice Hagner, who originally decided it in the lower Court, not as authority for annexing an easement for light and air, but for giving to the appellees the *corpus* of the adjoining land, and the Court of Appeals reversed him in the present case for following Shepherd *vs.* Pepper so literally.

And yet if Shepherd *vs.* Pepper is in point at all, it was the land itself, and not a mere easement for light and air, to which appellees are entitled.

The controlling consideration upon which the case of Shepherd *vs.* Pepper, which granted, not an easement, but part of a *dwelling house,* was decided, was one totally lacking in the case at bar, as the record will show, and as the Court of Appeals must have found in order to justify its reversal of the lower Court in the case at bar.

Shepherd vs. Pepper was an ordinary case for the reformation of a deed on the ground of mutual mistake, and had nothing to do with easements by implication.

We quote the opinion of this Court in the Shepherd case, delivered by Mr. Justice Blatchford:

> "Shepherd put in an answer to the bill, on the 1st of June, 1882, denying that the bill filed by him was dismissed for want of jurisdiction; denying that the omission of sub-lot 'A' from the first two deeds of trust was an accident or a fraud on his part or on

that of the agent; and denying that Pepper has the right to have the deeds corrected so as to include sub-lot 'A'; but admitting that he (Shepherd) executed the first two deeds of trust in the belief that the whole property covered by the house was embraced in them." (133 U. S., page 640.)

It was the intention of both Pepper and Shepherd that the whole of this property should be included in the deeds of trust. (133 U. S., page 645.)

"When the first bill was filed by Pepper he knew that Shepherd had merely a tax title to sub-lot 'A'; and Shepherd, in his answer to that bill, averred that title to sub-lot 'A' never belonged to him, and that he therefore purchased what is called a tax title to sub-lot 'A,' but it turned out to be void and of no effect. Therefore, Pepper could not at that time have attempted to reform the first two deeds of trust so as to include sub-lot 'A,' because Shepherd then had no title to that sub-lot. But the fact that both Pepper and Shepherd agree that it was intended by them that the first two deeds of trust include sub-lot 'A,' gave Pepper a right to assert an equitable mortgage against that sub-lot; so that afterwards, when Shepherd bought in the proprietary title to it, as the evidence showed he did, Pepper was for the first time in a position to insert a lien against it." (133 U. S., page 648.) * * * "We think that Pepper is entitled to have the whole of lot '3' sold. It was omitted at least by accident from the first two deeds, when both parties supposed they covered it. * * * (133 U. S., page 650.)

"In regard to Mrs. Gray, the letter to her, written by Mr. Brown, of the firm of Fitch, Fox & Brown, who were negotiating for her the loan to Shepherd, the letter being dated April 18, 1873, speaks of the loan as one 'to be secured by a second mortgage, the prior mortgage being for $45,000.' * * * (From the same page.) "Mrs. Gray is only a mortgagee, and not the owner in fee of sub-lot 'A'; and her inter-

> est in the property is subject to the prior and subsequent interests of other parties, as those interests are usually ascertained and administered by a court in equity for the benefit of all concerned."

It appears from the foregoing extract from the opinion of the Supreme Court that there was a plain, clear case for the reformation of Pepper's deed, on the ground of mutual mistake on the part of the parties, and that Mrs. Gray had full notice of the mistake, and purchased with the belief that the trust to Pepper covered all of the ground included in her trust. She could not, therefore, have been misled as to the nature of her securities. The only question really involved, so far as the owner of the ground was concerned, was whether or not, admitting that Pepper once had a clear equity for the reformation of his deed, on the ground of mistake, he had not forfeited it, by his *laches*.

In the face of these facts found by this Court, the emphasis laid by the Court below upon one sentence of Mr. Justice Blatchford's opinion (see italics, Record, p. 152) was certainly not justified by the facts of the case or the context of the opinion.

The record in this case at bar shows that no mistake or fraud whatever existed in the minds of the appellees or was perpetrated upon them by Haller, their grantor. The opinion of Judge Hagner in the Equity Court (Record, p. 141) finds that Haller was neither "stupid" in making a mistake as to what he intended to convey, nor guilty of any "fraud" as to the appellees. Indeed, Judge Hagner, who was not a little severe upon the appellants for their actions, *after* the deed to Grayson and Heald was made and delivered, expressly "*acquits*" Haller of any participation in either fraud or mistake

(opinion of Judge Hagner, Record, p. 141) *at the time* of its execution and delivery.

The keynote of the whole situation appears to have been the negligence of the appellees in securing less land than they *afterwards* discovered they wanted.

> "A little more intelligent appreciation of the situation at the time of the parties interested would have resulted in carrying into effect the plan to release the strip and have avoided all the vexatious litigation." (Opinion, Record, p. 141.)

That Judge Hagner was mistaken in thinking that any plan ever existed to attach the ten-foot strip to the Grayson and Heald trust is immediately evident from an inspection of Exhibit No. 5 (Record, p. 112), from which it appears that *several months after* the deed of trust to Grayson and Heald, Haller tried to negotiate a release of 10 feet to enable him to sell out to a stock company (Record, p. 120). The negotiation fell through. The Judge of the Equity Court was right, however, in finding that the appellees' troubles might have been avoided by the exercise of some care or intelligence on their parts.

When the appelees loaned their money, there stood the building, with its alleged dependence for light and air upon the south and west, and the extreme likelihood of the adjoining property passing out of Haller's hands, as it was already heavily mortgaged, and they well knew that Haller was insolvent and utterly incapable of protecting the adjoining property from sale. Yet without having the title examined, without making any effort to discover what the real location of the building was, they gave up their statutory lien upon the buliding, thinking to further advantage themselves by accepting a deed of trust. It is true that in answer to the following leading

question: "At the time of taking this second trust, what knowledge, if any, had you that the Victoria Flats building was not fully comprised within the ground specified in that deed?" Mr. Grayson answered, "None whatever; I never had any suspicion or any intimation otherwise," and his understanding and belief was that the entire ground belonged to Mr. Haller, and he did not know anything about the dimensions of the building at all (see Dep. of Grayson). He does not say he was deceived in any particular by Mr. Haller or the appellants or prevented from ascertaining what security he was to receive, but apparently at that time considered the matter of no importance.

This negligence completely deprives the complainants of any standing in a Court of Equity for relief, whether by way of reformation of their deeds or otherwise.

> "Equity will not extend its aid to relieve a mistaken party who has been guilty of culpable negligence. Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person." Grimes *vs.* Sanders, 93 U. S., 55; Connor *vs.* Welsh, 51 Wis., 431, where it was said:
>
> "It is infinitely better that men should be held to consequences of their own culpable carelessness than that courts of equity should undertake to relieve therefrom. The rule requires reasonable caution and prudence in the transaction of business, and is deeply imbedded in our jurisprudence. It is within the principle of reason of *caveat emptor*. The abrogation of the rule would tend to encourage negligence, and to introduce uncertainty and confusion in all business transactions."

Point IV.

Does Shepherd *vs.* Pepper justify the decree that the property may be sold as an entirety?

The modified decree of November 30th, 1903 (Record, p. 165) provides for the sale by the trustees of all the property, the Flats and the adjoining lands, as a *whole*, "if they shall find it expedient and advantageous so to do."

As the real contention is between the legal owners of the adjoining land on the one hand, who would be entitled if it were separately sold to the surplus, if any, after a $12,000 trust is satisfied, and on the other hand encumbrances to the extent of $120,000, what the trustees will find it "expedient and advantageous to do," can be easily guessed when it is remembered that these trustees were selected over the protest of the appellants from *Haller's creditors* exclusively.

The decree, even if the appellees were entitled to an easement for light and air, is manifestly unjust. Instead of definitely adjudicating the rights of the parties, it arbitrarily commingles parcels of property in which there are manifold conflicting interests and makes it possible and practically certain that these various properties will be offered for sale in one large parcel, under such circumstances as to practically exclude Wood and Talbott from any opportunity to protect themselves by becoming bidders at the sale.

The answer made by the Court below to all of these objections is the supposed authority for such a proceeding found in Shepherd *vs.* Pepper (*supra*).

We have already tried to point out one striking difference between that case and this, by which, in spite of very many similarities in unimportant details, it is en-

tirely without value as a precedent for decreeing an easement for light and air by mere implication of law, so also the method of sale proper in that case is wholly improper here.

There the controversy was wholly between a number of *creditors of Shepherd,* and Shepherd himself. The debts secured upon the several portions of Shepherd's land were Shepherd's debts. Only in case the *entire* property brought more than the *sum total* of the debts secured upon it, was Shepherd entitled to anything. If he had been at the sale he could have bid in none of the property that would not at once have belonged to his creditors and been an indirect way of paying his debts. The objections came from one incumbrancer who wished to secure an improper advantage over another.

> "We think that Pepper is entitled to have the whole of Lot 3 sold. It was omitted at least by *accident* from the first two deeds, when both parties *supposed they covered it.* * * * (Shepherd *vs.* Pepper, 133 U. S., p. 650.)
>
> "In regard to Mrs. Gray, the letter to her, written to her by Mrs. Brown, of the firm of Fitch, Fox & Brown, who were negotiating for her the loan to Shepherd, the letter being dated April 18, 1873, speaks of the loan as one 'to be secured by a second mortgage, the *prior mortgage* being for $45,000.' * * * Mrs. Gray is only a mortgagee, and not the owner in fee of sub-lot A; and her interest in the property is subject to the prior and subsequent interests of other parties, as those interests are usually ascertained and administered by a Court in Equity for the benefit of all concerned."

A simple case of marshalling Shepherd's assets to pay Shepherd's debts.

In the case at bar Wood's assets and Talbott's assets are to be marshalled to pay Haller's debts.

Wood and Talbott purchased two distinct pieces of property, each subject to a deed of trust to secure a debt due from Haller. They are now required to bid $132,000 to protect their equity of redemption in their second purchase, encumbered by a deed of trust for $12,000.00.

It is respectfully submitted that the most the appellees are entitled to, as against these appellants, is to have the property described in their trust, together with the building in its *entirety* so'd as one piece. By its entirety is meant, with its overhanging eaves and its walls one inch over the line. In spite of all contrary assertions there is no evidence that the wooden porches and cement walk are anything more than merely a *convenience* to the premises. The appellants are certainly entitled to have the adjoining ground sold subject only to the $12,000 trust upon it.

Respectfully submitted,

JOHN RIDOUT,
CHARLES F. CARUSI.

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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

FRANK I. WOOD, ET AL
Appellants
vs.
DAVID C. GRAYSON
TRUSTEE
ET AL

Nos. 89, 90 and 439, Oct. term, 1905

Additional Brief on Behalf of Appellants in 90 and 439 and Appellees in 89.

JOHN RIDOUT,
CHARLES F. CARUSI.
Attorneys for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

FRANK I. WOOD, ET AL *Appellants* *vs.* DAVID C. GRAYSON TRUSTEE ET AL	Nos. 89, 90 and 439, Oct. term, 1905

Additional Brief on Behalf of Appellants in 90 and 439 and Appellees in 89.

The said appellants make the following additional assignment of error, to be numbered 3:

The Court erred in holding that a ten-foot strip of appellant's land is subject to an easement for support of certain walls and projections and the overhanging of certain eaves.

In support of this additional assignment, appellants rely upon their brief already filed.

In this connection, the especial attention of the Court is called to the conceded facts that the utmost width of these encroachments does not exceed four feet nine inches. (Record, page 51, folio 125.)

The contentions of appellants in opposition to the recognition of such an easement as is set forth in the third assignment of error, are fully set forth in the original brief to which reference is hereby made.

It is respectfully submitted that for the errors assigned in the original brief and the error set forth in said third assignment, the decree below should be reversed.

Respectfully submitted,

JOHN RIDOUT,

CHARLES F. CARUSI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

BRAINARD H. WARNER ET AL.,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
No. ~~388~~. 89.

H. MAURICE TALBOTT AND FRANK I. WOOD,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
No. ~~389~~. 90.

BRIEF FOR APPELLEES.

J. J. DARLINGTON,
Solicitor.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

BRAINARD H. WARNER ET AL.,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
} No. 358.

H. MAURICE TALBOTT AND FRANK I. WOOD,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
} No. 359.

BRIEF FOR APPELLEES.

The above are appeals from a decree rendered by the Supreme Court of the District of Columbia in the case of David C. Grayson, Trustee, et al., *vs.* Frank I. Wood et al., and affirmed by the Court of Appeals of the District of Columbia. The appeal in No. 358 is on behalf of the parties secured by a first deed of trust on the Victoria apartment house from so much of the decree of the Court of Appeals as denies to them certain easements in and over a 10-foot strip of ground on the south and west sides of the apartment house, allowed them by the

decree of the Supreme Court of the District of Columbia; while the appeal in No. 359 is by the owners of the apartment house, or of the equity of redemption therein, from the decree below, affirmed by the Court of Appeals, allowing those easements to the parties secured by a second deed of trust upon the apartment house property.

Statement of Facts.

On or about January 13, 1897, Mrs. Alice S. Hill conveyed to Nicholas T. Haller the whole of lots 1 and 2, in block 45, Hill's subdivision, University Park, a diagram of which lots is exhibited at page 12 of the record. Mr. Haller thereupon entered upon the erection of an apartment house, known as the Victoria Flats, on the portion of said lots embracing the north 120 feet front thereof by a depth of 124 feet, making for the purpose a building loan of $75,000, secured upon the said described parts of said lots by a deed of trust to Brainard H. Warner and Louis D. Wine. He simultaneously executed a deed of trust to the defendants McReynolds and Meriwether upon the remaining portions of lots 1 and 2 to secure his promissory notes, aggregating $12,315, held at the time this suit was instituted by Mrs. Alice S. Hill, Charles M. Carter, and, as collateral, by the First National Bank of Gaithersburg. For convenience, the encumbrance securing the $75,000 building loan will be referred to as the Warner trust, while the encumbrance upon the portions of the two lots not covered by the Warner trust will be designated as the McReynolds trust.

During the progress of the apartment house, Mr. Haller became further indebted in the sum of $30,087.65 to various material men and mechanics, and in the sum of $10,350, borrowed money. To relieve the property of this indebtedness, a second deed of trust upon the above-described portion of the two lots covered by the Warner trust was executed to David C. Grayson and John C. Heald, the

material men very generously consenting to admit into this second trust upon an equality with themselves the $10,000 of borrowed money, which, under the law, would have been subordinated to their liens. This second trust will be referred to, for purposes of convenience, as the Grayson trust.

The design or plan for the apartment house contemplated its erection 20 feet west of the Fourteenth street line and 10 feet south of the line of Welling Place, giving a margin of 10 feet at the narrowest point between the south and west walls of the building and the lines of the Warner and Grayson trusts for projections, ventilation, and light. When the erection was begun, however, an adjacent owner claimed the existence of a building restriction, reserving from improvement 40 feet of the lot abutting on Fourteenth street and 20 feet on Welling Place, and threatened an injunction suit if this alleged building restriction were not observed (Rec. p. 47).

The answers aver that there was no such valid building restriction, but that Mr. Haller, on being informed that it did exist, and without investigating the fact, set his building back accordingly (Rec. p. 17). The result is that the walls of the building encroach, as the defendants claim in their answers, upon the ground covered by the McReynolds trust, the porches on the south and west sides extend over the McReynolds property to the extent of 4 feet 9 inches (Rec. p. 51), while the areaways, as alleged in the bill and not denied in the answers, in like manner encroach 5 feet. In addition, there are 36 windows in the west wall, 19 windows in the south wall, 22 doors in the west wall, 5 doors in the south wall, 4 cellar windows in the west wall, and 4 cellar windows in the south wall, leading out to the porches, the building thus depending wholly for light and air and for communication with its interior from the south and west basements, and from its apartments, upon the

contiguous portions of the ground covered by the McReynolds trust (Rec. p. 51). To close these windows and doors, and to remove these porches and areas would be disastrous to the property, would deprive a number of the apartments of light and air, would render those on the south and west sides practically unavailable, and would largely cut off or interfere with the salability of the property, or the deriving of an income therefrom (Rec. pp. 48–9). There is a recess in the front and in the rear of the building, described in the opposing brief as "the usual recesses;" but, notwithstanding these, Mr. Robert I. Fleming testifies, at page 125 of the record, that the construction of adjacent buildings on the south and west "would really ruin the building;" that the recess on the south affords very little relief (Rec. p. 126), and that if buildings were erected 10 feet away it would help very much, but that it would still damage the flats to some degree (Rec. p. 127); while Mr. James G. Hill, at page 130, states that the recesses would benefit two rooms in the front and two in the rear of the building. The answer, at page 19, of Wood, adopted by his co-defendant Talbott, admits that "the said property, owing to its improvident plan of construction, was dependent for certain of its light and air upon the adjoining property." At page 17, it avers that this location was unintentional, and that "said Haller intended to erect the said building well within the lines of the conveyance to Warner and Wine," and that "in the erection of a building of this character due allowance is and should always be made for the maintenance of side windows, irrespective of the bare contingency of the continued vacancy of the adjoining ground, owned by other parties, and further shows that while said windows may be necessary for the most convenient use of the building as now constructed, yet nevertheless he is advised and therefore avers that if said building were remodeled to conform to a

proper plan such as should have originally been adopted, that then and in that case said windows would no longer be such a necessity to the proper and successful use of the said building as is averred in the bill." At page 96, the defendant Wood on cross-examination admits that, if the land surrounding the Victoria Flats building were built upon, close up to the flats, they would be deprived of light and air. At pages 76–77, Mr. Talbott admits sufficiently, though evasively, that it could not be conducted successfully without an adjacent 10-foot strip, while at page 109 Wood testifies that both he and Talbott knew additional ground was a necessity for the flats, and that they accordingly procured it in the manner hereinafter shown.

In other words, the answers admit, and the proof shows, that the changed location and the consequent encroachment upon the adjacent or McReynolds lots for necessary projections, light, and air will result in the ruin of the property, and the consequent destruction of the security intended to be afforded the complainants by the encumbrance securing their notes, if the Victoria Flats is to be deprived of the ground actually added to or appropriated for the flats by Mr. Haller, at a time when he was the owner of both the tracts in question, as hereinafter shown.

With regard to the holders of the promissory notes secured by the Warner trust, which trust was given before the building was commenced, the plan at that time contemplated a margin of 10 feet at the narrowest point on the south and west sides within the lines of the Warner deed of trust. With respect to the holders of the Grayson trust notes, the proof shows that these were accepted by the material men and mechanics without the slightest intimation or suspicion upon their part that their trust deed did not fully comprise the entire Victoria Flats building (Rec. pp. 35, 50), but, on the contrary, with

the understanding upon their part that there was 10 feet of ground laid outside the building for an air space (Rec. p. 41). The defendant Wood in his answer claims, it is true, that the complainants were aware of the improper location of the building at the time they accepted the security of the second deed of trust, but at page 110, he admits that this claim of the answer is without foundation.

About April 9, 1898, the defendant Wood exchanged an alleged equity in certain lots in square numbered 226 for an undivided one-half interest in the Victoria Flats property (Rec. pp. 52–3), in connection with which transaction Mr. Haller included a 10-foot strip on the south and west sides of the building, the conveyance being made to the defendant Bernard A. Duke, who gave a contemporaneous written declaration that he held it "in trust for N. T. Haller and Frank Ivey Wood, one-half interest each" (Rec. p. 93). Contemporaneously with this transaction, namely, on April 5, 1898, a written agreement was entered into between Haller and Wood to the effect that a stock company should be organized for the purpose of owning and conducting the Victoria Flats, to which they would convey the property, including the 10-foot strip, the capital stock to be divided between them according to the terms specified in an agreement, which is set forth at pages 100–1 of the record. It is thus apparent that Mr. Haller, the party primarily responsible for the erection of the building in the manner out of which the present controversy grows, at a time when he was the owner of both the Warner and the McReynolds tracts, intended, and endeavored, to rectify the irregularity by uniting with the Warner property an adjacent 10-foot strip of the McReynolds property, thus affording substantially the same provision for projections, air and light, as were contemplated by the original application upon which the Warner trust

was based, and which was supposed to have been carried out at the time the Grayson trust was executed.

Also, contemporaneously with this transaction, an agreement was entered into that $4,000 of the McReynolds encumbrance should be paid, and that the 10-foot strip should thereupon be released from the McReynolds deed of trust. The $4,000 was raised by borrowing that sum from the Bank of Gaithersburg upon the security of $4,000 of the McReynolds notes as collateral, which loan not having as yet been paid to the bank, the release has not been obtained. The claim, insisted upon by the defendants throughout the testimony until complainants had succeeded in obtaining written evidence to the contrary, that this privilege of securing a release of the 10-foot strip expired on March 10, 1898, was conceded to be unfounded when the written evidence was secured (Rec. pp. 118–24).

The opposing brief states as a fact, at page 4, that the equity given by Wood for his half interest in the Victoria Flats was "valued at $20,000," and that it "netted Haller $20,000 in a subsequent trade." The only foundation for this statement is the admittedly hearsay and incompetent testimony by Wood that Haller told him he had valued the equity at $20,000 in a subsequent exchange of properties. The fact is that the Wood equity in question was subject to two prior trusts, aggregating $20,000, under the second of which it was sold, barely clearing that, and leaving no surplus at all (Rec. pp. 62–3), so that in fact the consideration given was without any actual value.

Subsequently, on or about the 1st day of April, 1899, Talbott purchased Haller's remaining half interest in the Victoria Flats property, and also a half interest in the McReynolds property, paying therefor in money and notes $3,100. He states that in this transaction he regarded the Victoria Flats as the really valuable

property, and the chief consideration for his purchase (Rec. p. 27). What the value of the McReynolds equity was at that time supposed to be is shown by the fact that, contemporaneously, Wood purchased Haller's remaining one-half interest in that equity for the sum of $250 (Rec. p. 98).

The Grayson trust, as will be seen by reference to page 116 of the record, contains a provision that the trustees under it should collect the rents and profits of the building over and above the amount necessary to pay the interest on the first trust, the taxes, insurance, ordinary repairs, and the running expenses, and apply the same toward the payment of the Grayson trust notes. Pursuant to this provision, and by general consent of the creditors (Rec. p. 35), the firm of B. H. Warner & Co. collected the rents of the building, which were sufficient to pay all the charges enumerated, including the interest on the second trust notes (Rec. pp. 35–36), until May, 1899, when the defendants Wood and Talbott proposed to Mr. Heald, one of the trustees, that the commissions of B. H. Warner & Co. could be saved by allowing Wood to collect the rents, upon which representation Messrs. Grayson and Heald assented to the change (Rec. pp. 44, 35–36).

In the opposing brief, at page 5, it is asserted that Wood successfully conducted the flats for a time, but found it would be impossible to meet the exorbitant interest charges from the revenue. The complainants, on the contrary, charge in effect that Wood and Talbott first endeavored to purchase the second trust notes at a heavy discount; that, failing in this, they threatened that the holders of those notes should get nothing if they could prevent it; that they thereupon made default in the very first instalment of interest upon the Warner trust falling due after Wood had undertaken the management of the property under the circumstances above set forth, and ap-

parently for the very purpose of bringing about a default and consequent foreclosure sale; that they made no effort to obtain any extension of time, or to effect any arrangement to prevent foreclosure; that, on the contrary, when the complainant Grayson urged them to prevent it, offering himself to advance the deficiency if the rents in their hands were insufficient to pay the interest in arrears, they declined to do so, having formed the project of becoming themselves purchasers at the foreclosure sale, and thus cutting out the second trust note holders; and that they actually went so far in pursuance of this scheme, for the purpose of repelling competition at the sale, as, only four days before the date fixed for it, to have Wood file a bill against the defendant Duke, set out at page 13 of the record, representing to the court that Duke was the owner of the Victoria Flats property; that Wood was the owner of the property described herein as the McReynolds property; that the Victoria Flats property was pierced with a large number of windows on its southern and western sides; that it had a large number of porches extending its whole depth and width, projecting about 6 feet from its walls; that its eaves projected beyond its southern and western walls, throwing water and melted snow upon Wood's land; that areaways had been excavated extending on an average 2 feet into the land of Wood; that none of these constructions were made with the consent or permission of Wood; that they seriously injured his land, greatly diminished its value, and constituted nuisances injurious to his property, the continuance of which he was entitled to prevent, and praying for a mandatory injunction to close the windows and to remove the porches, projecting eaves, areaways, etc., the bill being verified by Wood's oath

The defendants denied having formed any such scheme, which the answer of Talbott denounced as a "nefarious" one. The Court of Appeals, when this case was before it

on an interlocutory appeal from the order below appointing receivers, in an opinion which seems to be omitted from the record, but which is reported in 16 D. C. App. 174, declares the scheme, if true, one which "it would be superfluous to characterize with an epithet." Both courts below found the complainants' averments to have been established by the proof, and it only remains to see whether their findings in this respect are sustained by the evidence.

In the first place, as above noted, the undisputed evidence shows that, under the management of B. H. Warner & Co., the flats, after paying all prior interest charges, taxes, insurance, operating and other expenses, left a surplus sufficient to pay the interest upon the second trust notes. The defendants, as shown by the testimony of Mr. Heald, contrary to the denial of their answer (Rec. pp. 19, 20), obtained the consent of the trustees to take the property out of the hands of Warner & Co. upon the representation that they could thereby economize to the extent of the agents' commissions, whereupon the following occurrences took place:

1. Notwithstanding the denial of the answers, at pages 22 and 23, that any attempt was made to purchase the second trust notes "at a heavy discount, or any discount whatever," the testimony shows that both Wood and Talbot sought a discount of Grayson, obtained his agreement to accept nearly $1,000 less than the principal of his claim, besides the interest, which offer appears not to have been satisfactory to them; that Wood then went to McClure for a like purpose, stating to him that "there was one or two that he would like to see get their money, but that there were others, and that Grayson was one, who, if he could prevent it, would not get a dollar" (Rec. pp. 40, 43); and that a man introducing himself as Wood called upon Mr. George C. Esher, offering only 20 cents on the dollar for his notes, and stating that, if this

was not accepted, he would see that Esher should lose it all (Rec. pp. 50–1). It is true that, called upon to identify the man who thus called upon him, both Duke and Wood being present, Esher pointed out the former, whereupon Wood denied that he had ever seen Esher upon the subject; no explanation, however, being offered of the fact, undenied, that the call was made and the language in question employed by a man professing to be Wood, Duke being, as is entirely apparent throughout the record, employed by Wood merely as his figurehead and tool.

It was claimed by Wood and Talbott, and is asserted in the opposing brief at page 5, that an effort to place a new loan of $100,000 at a low rate of interest, and thus effect a settlement of the claims against the Victoria Flats property, was defeated by Grayson. The fact is, however, as testified to by the defendants themselves, that Grayson did offer to abate nearly $1,000 of his claim; and, though refusing to enter into any written proposition to continue that offered reduction for an indefinite time, that he terminated the interview by asking them to call upon him again whenever they were willing to pay him $5,000 for his claim of nearly $6,000 (Rec. p. 29), and, further, that the new loan of $100,000 failed and was abandoned, not on account of any act of Grayson, but because the agent who had undertaken to negotiate it at the reduced rate informed the appellants that he could not accomplish it (Rec. p. 30).

The denial by Wood of the threats attributed to him by the witnesses, against the holders of the second trust notes who would not agree to discount their notes in the manner desired, is so modified by him on his cross-examination, at pages 101–2, as virtually to amount to a confession of them.

2. The plan of getting rid of the second trust note holders by discounting their claims having failed, the next step in the programme was the obtaining by Wood

from Duke of a deed to the 10-foot strip which Haller had united to the Flats, and which both Wood and Talbott, as above pointed out, admit was essential to their successful existence. No possible cause or reason is pretended by the appellees for thus attempting to deprive the Flats of this concededly necessary 10-foot strip, other than that charged by the complainants, namely, to place the Flats property in such a state that it could not be disposed of to any advantage at a foreclosure sale, enabling Wood and Talbott either to buy it at such a sale without competition, or else to dominate its value in the hands of any other purchaser.

3. The next occurrence was default in payment of the interest due under the Warner trust. The brief below attributed this default to the "exorbitant interest rate which the encumbrances bore;" but no attempt was made to explain the fact, that under the management of B. H. Warner & Co., before Wood assumed the management of the property, all the charges, including the interest on the second trust notes, had been paid; nor the further fact that, after the receivers were appointed, the property again paid all charges, including the arrearages, together with several instalments of interest upon the second trust notes (Rec. pp. 40, 104). As above stated, the transfer of the management of the property from Warner & Co. to Wood, following the separation of the 10-foot strip from the Flats, and the default in the next ensuing instalment of interest under the first encumbrance, were plainly but parts of a common, connected whole.

4. Upon learning of this default, only through the foreclosure advertisement, Mr. Grayson, the active trustee under the second trust, addressed two written communications to Mr. Wood, dated, respectively, August 22, 1899, and August 25, 1899, offering to advance the deficiency if the funds in Wood's hands were inadequate to the

payment of the interest, following up these written communications by two personal interviews, making the same proposition. He inquired of Wood whether he had asked for indulgence, or offered to pay the money which he had on hand, to which he replied that he had not. Grayson then offered to advance any money necessary to complete the interest payment, to which Wood replied that he would see Talbott and let Grayson know (Rec. p. 37). At the second interview, Wood refused absolutely to turn over the money in his hands for the purpose of aiding in the payment of the interest and thus stopping the sale, alleging, as his only reason, that he was acting "by advice of counsel" (Rec. p. 103).

Talbott came in before the interview was over, and inquired of Grayson what he would do with the money in case it was turned over to him and Mr. Warner refused to receive it, which inquiry, he claims, Grayson declined to answer. This alleged failure of Grayson to respond to the inquiry concerning the contingency proposed by Talbott was ingeniously put forward in the opposing brief and argument below as the reason why Wood and Talbott refused to consent to Grayson's proposal. The fact, however, is that Wood had refused, as he stated by the advice of counsel, before Talbott came in and made his suggestion ; that the refusal to turn the money over to Grayson for the purpose indicated was not based upon any intimation of a doubt whether the latter would fulfill his promise to make good any deficiency (Rec. p. 103); that, although there was a telephone in the Flats building, where the interview took place, no effort was made to call up Mr. Warner and inquire whether he would refuse the interest, nor was any effort made to see whether Warner would accept it (Rec. pp. 104–5); and the refusal was persisted in notwithstanding the undisputed fact that Grayson offered to go with them, and, if they would pay their part, make up the balance (Rec.

p. 38). Wood admits he had no reason to suppose that Warner would refuse to receive the interest; that he made no effort to ascertain whether he would or not; that he tried in no way to prevent the sale (Rec. p. 59), and had no desire to prevent it (Rec. p. 104). And see practically to the same effect, Talbott, at pp. 78-9.

The statements, at page 6 of the opposing brief, that the advice of Wood's counsel was not to pay over any money "unless assured it would be accepted and duly credited, and the threatened sale averted," and that "such an assurance could not be obtained," are to be found in the brief, only, and are wholly unknown to the record.

5. The next step in the matter was the filing of the pretended suit in equity by Wood against Duke, set forth at page 13 of the record. Duke, at pages 45–7, testifies that he merely held the title as trustee; that he never claimed any interest; that he never knew of any proposition to close the windows until the suit was brought against him, except that Wood had said they ought to be closed; that he, Duke, never had charge of the Victoria Flats, and never interfered in any way with their conduct or management, and that Wood did not ask him to do anything about closing the windows.

Wood, at pages 105–8, admits that Duke had no beneficial interest, and that he, Wood, made no attempt to close the windows or doors. He refuses to answer the question whether he really wished the relief granted which was prayed in his bill, evades answering the question whether the sole object of the bill was not to frighten away people who might have been willing to bid for the property at the foreclosure sale, and finally endeavors to put the entire responsibility for that remarkable proceeding upon counsel—an effort which, rather strangely, appears to be seconded in the opposing

brief. Mr. Talbott, however, testifies that the scheme was one proposed by Wood, to which he, Talbott, at first objected, but in which he finally acquiesced, as a means of informing possible buyers, by the record, of "the rights" that Wood and Talbott had (Rec. pp. 69, 79). And see the cross-examination of Wood upon this subject, by his own counsel, at pages 56 and 57.

6. That Wood and Talbott intended, themselves, to become the purchasers at this foreclosure sale, from which competing bidders were to be repelled in the manner above indicated, though not in terms admitted, is entirely apparent from the testimony of Wood, that, pending the advertisement, he took steps to avoid the placing of any sale signs upon the property, in order to prevent loss of the tenants (Rec. p. 109), and from the testimony of Mr. Talbott, at page 78, that either before the foreclosure advertisement went in, or while it was being published, he called upon Warner & Co., to arrange for replacing the first trust upon the property, after it had been made to serve the purpose of cutting out, by sale, the holders of the Grayson trust notes.

The opposing brief treats the case as though it raises simply the question as to the right to an implied easement for light and air. As shown in paragraph 4 of Wood's answer, adopted by Talbott, the south and west walls of the building are in part located over and upon the ten-foot strip, and as alleged in paragraph 11 of the bill and admitted in paragraph 11 of the answer, Wood and Talbott deny the right to use the portion of the strip on which the walls rest. Porches on each floor of the building, on its west and south sides, extend from five to six feet over the strip, and communicate with the building only by doors opening out upon them. As shown by the stipulation at pages 162–3 of the record, areaways, doorways, garbage chutes, and cellar doors for reception of the coal supply for the building are located upon, into,

and over the cement walks forming a part of the ten-foot strip, and are not otherwise accessible or capable of being reached or used. These were all completed at the time of the Grayson trust, and it is self-evident that, if now withdrawn and their use denied, the result will be to depreciate and destroy irretrievably the value of the building, and the security intended to be afforded by the trust.

The Equities.

An attempt was made below to distinguish the present case from an earlier one in the local courts, that of Manogue *vs.* Bryant, 15 D. C. App. 245, on the ground that, in that case, the failure to include the entire premises in the deed of trust was the result of mutual mistake between the granfor and the grantee, while, in the case at bar, Mr. Haller did not intend to include the 10-foot strip in either the Warner or the Grayson trust. We submit this attempted distinction is untenable, for two reasons, namely: First, there is no evidence to support the existence of any such distinction in fact between the two cases; and, secondly, such a distinction, if it existed, would affect no principle.

In the first place, the record shows that Haller did honestly attempt to annex the 10-foot strip to the Flats property, and thus relieve it of its dependence upon the McReynolds property. He did this, first, by his deed to Duke of the Flats property, including the strip; secondly, by his arrangement with McReynolds, to which Wood was a party (see Complainant's Exhibit Receipt, Rec. p. 119), to secure a release of the 10-foot strip from the McReynolds deed of trust, and, thirdly, by the contract with Wood of April 5, 1898, under which the Flats and the strip, as one entire property, were to be conveyed and held together by a stock company. All three of these transactions, as Wood admits, were contemporaneous with the acquisition of his interest (Rec. p. 120).

In the second place, if the distinction contended for existed, it would affect no principle. The original building plans contemplated a building which should set back 20 feet from Fourteenth street, and 10 feet from Welling Place, thus leaving a 20-foot strip on the western exposure and a 10-foot strip on the southern exposure of the building. On being notified of the building restriction claimed to exist, Haller set the building back 40 feet from Fourteenth street and 20 feet from Welling Place, giving no notice of this fact to the Warner and Wine note holders, and leaving the mechanics and material men, as the testimony shows, still to suppose that there was a 10-foot strip on the west and south sides. The effect of the distinction insisted upon is that, if he had intended to be honest with these parties, and had omitted this strip from the deed of trust by mistake, the case would be ruled by that of Manogue *vs.* Bryant; but that if he allowed them to take the deed of trust supposing that they were getting the 10-foot strip, while he himself knew they were not, the rule would be different. To state this proposition would seem, in a court of equity, conclusively to refute it.

If, then, this suit were by the note holders against Haller, no authority would need to be cited other than the case of Manogue *vs.* Bryant, assuming that case to have been correctly decided, and the only question would be whether, under the facts and circumstances disclosed by the evidence, Wood and Talbott, Haller's grantees, stand in any better position than he himself would do, if his conveyance to them had not been made. This question, of course, is simply the question whether they are, or can claim to be, innocent purchasers without notice.

Upon this question, before discussing it as a matter of law, the following testimony, given by the appellants themselves, is to be noted:

1. As above shown, the answer of Wood, adopted by Talbott, admits, at page 17 of the record, that due allowance generally is, and should always be, made for light and air, irrespective of the contingency of a continued vacancy of adjoining ground owned by other parties, and that, as the building was constructed at the time of their purchase, the windows were a necessity to the proper and successful use of the building, and, at page 19, that the location of the building was an "improvident" one. These admissions in the answers are fully confirmed by the testimony at pages 94 to 97, notwithstanding its disingenuous and evasive character. Mr. Talbott, at page 82, testifies that before his purchase he commented upon—

> "how foolish a man was to build on the ground a house of that kind, and then put a trust upon the surrounding land,"

and that he was then informed by Haller that he had—

> "taken care of that by getting an agreement from Meriwether and McReynolds to release 10 feet of that surrounding land;"

and again, at page 90, he declares—

> "I do not mean for one moment to say that I do not known that the closing of the south and west windows would not affect the hotel,"

evasively adding, "but how much I do not know." At page 73 he testifies that, before his purchase, he knew that the 10-foot strip had been taken from the McReynolds tract and added to the Victoria Flats by Haller's deed to Duke. At pages 68, 70, 71, 72, 74, 82, 86, and 88 he testifies that he had been told by Wood, Haller, and Duke, or by all of them, about the contemplated release of the 10-foot strip, before his purchase; at pages 75–6, that he knew he was bound to follow up such a notice, and, at page 87, that he thought of the note holders in this connection, but that he did not confer with

any of them. Mr. Talbott further testifies that knowing these facts, and realizing that the value of the McReynolds land *was largely increased* by the erection of the Flats in such manner as to be dependent upon that land for light and air (Rec. p. 75), and although he knew the placing of the building in its disadvantageous position was done by Mr. Haller after he had negotiated his loan with Warner & Co.; and that he had then given this building, so situated, to the Grayson note holders as their security when he was the owner of all the ground (Rec. p. 91), he nevertheless made his purchase upon the "process of reasoning" (Rec. p. 83) that he and Wood could try to make money out of the Victoria Flats, and, if they failed in that, they could then drop the Flats and make their money out of the adjoining ground, as they "were under no legal or moral obligation to see that the trust notes were paid" (Rec. pp. 74, 83, 89), and had "nothing to do with the moral aspect of Haller's dealings" with the Grayson and Heald people (Rec. p. 91).

It is impossible upon such a record, we respectfully submit, seriously to contend that Wood and Talbott stand in a better position than Mr. Haller would do if he were still the owner of the equities in the two properties.

Points and Authorities.

As above indicated, the case of Manogue *vs.* Bryant, 15 D. C. App. 245, is believed to be entirely in line with the facts of the present case in every respect, and rules it. That case, also, at page 256, answers the contention on behalf of the appellants that the appellees were negligent in not having a survey or measurement made, in order to ascertain whether the building as erected was within the lines of the trust deed.

The case of Frizzell *vs.* Murphy, 19 D. C. App. 440, 446,

is also identical in effect, holding it well settled, both upon principle and authority, that where the owner of both a quasi-dominant and a quasi-servient tenement conveys the former, retaining the latter, all such continuous and apparent quasi-easements as are reasonably necessary to the enjoyment of the property pass to the grantee, giving rise to an easement by implied grant. At the date of the Grayson trust, Haller, owning both the quasi-dominant and the quasi-servient tenement, conveyed the former and retained the latter.

The case of Janes *vs.* Jenkins, 34 Md. 1, is also precisely in point and to the like effect; and, although the Supreme Court of Massachusetts, in Keats *vs.* Hugo, 115 Mass. 204, 216, cited by appellants, in an opinion by Mr. Justice Gray, questions the authority of Janes *vs.* Jenkins, that learned justice later concurred in the opinion in Shepherd *vs.* Pepper, 133 U. S. 626, 650, asserting the same doctrine as Janes *vs.* Jenkins.

In this case of Shepherd *vs.* Pepper, the applicability of which to the present case is questioned in the opposing brief upon grounds not stated with sufficient clearness to be entirely intelligible, the mortgagor was not the owner of the additional ground at the time of the mortgage, though his improvement encroached upon it. Later, he gave a third trust to secure his promissory note to C, after he had acquired the quasi-servient tenement, so that, in fact, C's mortgage was the only encumbrance of record upon the additional ground. The court held that C took subject to the prior mortgages, not only upon the ground that, in the preliminary negotiation, C was informed that the loan would be secured by a second mortgage, but upon the wholly distinct and independent ground that the prior mortgages described the premises—

> "together with all the improvements, ways, easements, rights, privileges, and appurtenances, to

> the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to, or out of the said piece or parcel of land and premises."

The court say, at page 650:

> "The improvements and easements in question were visibly necessary for the dwelling house as then constructed, and were visibly upon, or required the use of, sublot A."

It is true that, in Shepherd *vs.* Pepper, Mrs. Gray was only a mortgagee, and not the grantee in fee of sublot A; but a grantee who obtains his deed, not merely with constructive, but with actual knowledge, full and complete in all respects, of the exact situation, and who takes it upon the avowed "process of reasoning" that, in his hands, the premises will not be subject to the legal and moral obligations of his grantor, it can not be contended stands upon a better footing than a mortgagee, or can claim to be considered an innocent purchaser without notice.

The language of the deed of trust in Shepherd *vs.* Pepper, above quoted, is practically identical with that of the Grayson deed of trust (Rec. p. 116), and is the same in substance with that in Janes *vs.* Jenkins.

In view of the foregoing decisions, establishing the law in this jurisdiction, it would seem hardly necessary to follow counsel in their discussion of the somewhat conflicting state of the authorities in other jurisdictions. That conflict, however, is by no means so one-sided as the appellants' examination of the authorities seems to have led them to conclude.

At pages 22–25, it is represented that Janes *vs.* Jenkins, 34 Md., 1; Sutphen *vs.* Thelkerson, 38 N. J. Eq.,

318, and Greer *vs.* Van Meter, 54 N. J. Eq. 33, are the only American cases holding that there can be an implied grant of easements, or, at least, of easements of light and air, over and retained by the grantor upon severance by him of the estate If confined to easements of light and air, this contention could be admitted without affecting the decision in this case. As is shown *supra*, the easements here contended for are not confined to easements of light and air, but embrace others of almost, if not quite, equal importance, and which were indicated by visible, tangible, structural conditions, as above pointed out.

As the assignments of error do not contest the correctness of the decree below in its allowance of an easement over the 10-foot strip for the purposes of the porticoes and other projections, and the approaches to the entrances along the south and west sides of the building, the allowance of these easements is not in controversy upon this appeal.

Upon the principle of construction that, where a man grants a thing, he grants with it everything necessary to its enjoyment, a grant by the owner of a tenement will pass to the grantee all those continuous and apparent quasi-easements which are necessary to the reasonable enjoyment of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted, these being regarded as easements appurtenant to the land granted. 14 Cyc. 1166. In order that such an easement may pass by implication, it must be annexed to the estate granted, must be reasonably necessary for the beneficial enjoyment of the same, and must be in open, apparent, and continuous use at the time of the grant (14 Cyc. 1168; Durkee *vs.* R. R. Co., 24 N. H. 489), all of which conditions concur in the case at bar.

Open, visible ditches (14 Cyc. 1169, 1172, et seq.; Thayer *vs.* Payne, 2 Cush. 327; McElroy *vs.* McLeary, 71 Vt. 396; Stuyvesant *vs.* Early, 58 N. Y. App. Div. 242; Sanderlin *vs.* Baxter, 76 Va. 299; Quinlan *vs.* Noble, 75 Cal. 250); a furnace flue (Ingalls *vs.* Plamondon et al., 75 Ill. 118); an alley way (Cihak *vs.* Klekr et al., 117 Ill. 643; Burns et al. *vs.* Gallagher et al., 62 Md. 462); a water ditch and water rights (Cave *vs.* Crafts, 53 Cal., 135); rights of way (Ellis *vs.* Bassett, 128 Ind., 118; McTavish *vs.* Carroll, 7 Md. 352); stairways in a building (Galloway *vs.* Bonesteel, 65 Wisc. 79; Geible *vs.* Smith, 146 Pa. St. 276); a flow of water forced from vendor's premises, through pipes, to the premises of the vendee (Toothe *vs.* Bryce, 50 N. J. Eq. 589); a portion of a building projecting upon the land retained by the vendor (R. R. Co. *vs.* Needham, 61 N. Y. Supp. 992), have all been held to be subjects of implied easements.

Nor, according to the weight of authority, is a strict or indispensable necessity the condition of such implication; it is sufficient if the necessity be such as to render the easement necessary for the convenient and comfortable enjoyment of the property, and as it existed before the severance was made. 14 Cyc. 1171. In Ingalls *vs.* Plamondon, *supra*, reasonable necessity is held to be the proper rule; in Cihak *vs.* Klekr, *supra*, that the easements shall be "highly convenient and beneficial"; in Mitchell *vs.* Seipel, 53 Md. 264, and in Eliason *vs.* Grove, 85 Md. 226, that it shall be "reasonably necessary"; in Ins. Co. *vs.* Patterson, 103 Ind. 582; Irvine *vs.* McCrary, 108 Ky. 495, 500; R. R. Co. *vs.* Gayton, 93 N. W. Rep. 163; and Greer *vs.* Van Meter, 54 N. J. Eq. 270, that it shall be "necessary to the beneficial enjoyment of the premises granted," and in Havens *vs.* Klein, 51 How. Pr. 82, that it shall be "necessary to the enjoyment, and clearly intended from the circumstances

existing at the time when the conveyance was made."

Light and air are, under proper circumstances, proper subjects of implied easements.

Morrison *vs.* King, 62 Ill. 30.
Cherry *vs.* Stein, 11 Md. 1, 24.
Janes *vs.* Jenkins, 34 Md. 1.
Story *vs.* Odin, 12 Mass. 157, 160.
Ins. Co. *vs.* Patterson, 103 Ind. 582.
Greer *vs.* Van Meter, 54 N. J. Eq. 270.
Irvine *vs.* McCrary, 108 Ky. 495.

And see a review of the authorities upon this subject in—

Lampman *vs.* Milks, 21 N. Y. 505, 511, et seq.

An implied grant of an easement of light will be sustained in cases of real necessity, though denied when it appears that the claimant may, at a reasonable cost, substitute other lights for his building.

Turner *vs.* Thompson, 53 Ga. 273.
Rennyson's Appeal, 94 Pa. St. 147, 152–3.

> "There is no occasion to question the doctrine laid down in Washburn on Easements, Chap. IV, Sec. 6, p. 26, that, 'if one sell a house, the light necessary for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant land would pass as incident to the dwelling house, because necessary to the enjoyment thereof.'"
>
> White *vs.* Bradley, 66 Me. 254, 263.

Where necessary to the enjoyment, and clearly intended from the circumstances existing at the time the conveyance was made, an easement for light and air will pass by implication (Havens *vs.* Klein, 51 How. Pr. 82; Speis *vs.* Damm, 54 How. Pr. 293; O'Neil *vs.* Breese, 23 N. Y.

Supp. 526). As pointed out in the opinion of the court below, at p. 152 of the record, the same rule is adopted in United States *vs.* Appleton, 1 Sum. 492, the opinion in which case was rendered by Mr. Justice Story. See, also—

Maynard *vs.* Esher, 17 Pa. St. 222.
Dill *vs.* Board of Education, 47 N. J. Eq. 421.
Powell vs. Sims, 5 W. Va. 1.
Holloway *vs.* Southmayd, 139 N. Y. 390.

With regard to the Connecticut authorities cited in the opposing brief, to the effect that no inplied grant of an easement in light and air will be sustained, implied grants of land, or of easements, or of any interest in land, are declared to be allowable in that State, when allowable at all, "to a very much more limited degree than in other States."

Whiting *vs.* Gaylord, 66 Conn. 337, 349.

In Morrison *vs.* Marquardt, 24 Iowa, 35, cited in the opposing brief, the court, denying the implication of an easement of light and air in the case before it, under its own circumstances, does so, in terms, "without positively deciding that there may not, under any circumstances, be an implied easement of light and air."

Kneiper *vs.* Klein, 51 Ind. 316, cited as holding that there can be no such implication, uses language tending to sustain that contention, but is overruled in Ins. Co. *vs.* Patterson, 103 Ind. 582.

Keats *vs.* Hugo, 115 Mass. 204, is to the effect contended for, namely, that there can be no implied easement of light and air. Neither the language of the opinion, its reasoning, nor the facts of the cases to which it applies, render it applicable to any case except those in which easements of light and air only are involved, and, as above noted, Mr. Justice Gray, by whom the opin-

ion of the court was delivered, concurred with all the other justices of this court; in so far as this question is concerned, in the decision arrived at.

Shepherd *vs.* Pepper, 133 U. S. 626, 650.

Even if Keats *vs.* Hugo were to be taken as conclusive of the question which it decides, it would not reach the present case. In Keats *vs.* Hugo, the purchaser knew that he was dependent for light and air upon land not embraced in this deed. In the case at bar, Haller obtained the $75,000 building loan secured by the Warner trust under the inducement held out by him that he would so place his building on the lot as to leave the necessary and essential 10-foot strip on the ground covered by the deed of trust; and the Grayson trust was accepted by the note-holders which it secured, upon the understanding, created by him, that this had been done, and that the 10-foot strip was a part of the Victoria Flats property.

Hutchins *vs.* Munn, 22 D. C. App. 88, has no possible bearing upon the case, for the reason, among others, that there was in that case no common grantor or owner.

To Parker *vs.* Foote, 19 Wend. 309, and the other cases cited to the effect that the doctrine of ancient lights, or of title by prescription to the use of light and air over the land of another, is inapplicable in this country, no reply need be made, for the reason that this case presents no question of that character.

The argument at pages 38–9 of the appellant's brief, that the holders of the notes secured by the deeds of trust should be denied relief because of laches or negligence upon their part, it is submitted, finds no justification in the facts of the case. To hold that it is "culpable carelessness," or want of "reasonable diligence," for the makers of a building loan to trust that the borrower will place the building upon the land upon which he has

given security for the loan, and upon which he has engaged to place it, without following him up with a surveyor to see that he does so, or for persons to take a deed of trust upon a completed building, offered as security for their claims, without having a survey made to ascertain that the building stands wholly within the metes and bounds which the maker specifies in his deed, would impugn at least ninety-nine per cent of the transactions of this character which take place in any community. As will be noted from the facts of the case, there is no claim by the appellants that they are innocent purchasers without notice.

The remaining objection presented by the assignment of errors is to the alternative provision in the decree for sale of the entire property, as a whole, if it is found that it will bring more by a sale in that way than if sold in separate parcels.

The appellees have at no time asked that the two properties should be sold as one, or contended that it was necessary to do more than restore to the Flats building the 10-foot strip taken from it by the appellants under the circumstances heretofore pointed out. A decree in that form, presented by the appellees and printed as an appendix to this brief, was opposed by the learned counsel for the appellants on the ground that, as the court below based its opinion largely upon Shepherd *vs.* Pepper, the logical thing to do was to follow the form of the decree in that case.

With regard to the objection on this ground, presented for the first time in the Court of Appeals, it is to be noted that neither the trustees under the McReynolds trust, nor any holder of the notes thereby secured, have united in this appeal, or made any objection to the decree, either on this or on any other ground. From the standpoint of the appellants themselves, it can hardly be claimed that they have just cause to object

to a form of decree which provides for sale, either as a whole or in parts, as may prove most promotive of the best results and the realization of the highest price. The appellees, however, as stated, have never insisted, nor do they now insist, upon the alternative provision of the decree to this effect, but will be entirely content with a decree in the form presented in the appendix, or in any other form which, in the language of the bill, will constitute "equitable terms with regard to the holders of the promissory notes secured by the deed of trust to McReynolds and Meriwether." As stated, the holders of these notes are entirely satisfied with the decree in its present form.

The claim (at page 40 of appellants' brief) that the trustees to sell were selected over the protest of the appellants, and from Haller's creditors exclusively, is not only not covered by either of the assignments of error, but is wholly unfounded in fact. Warner and McReynolds are not creditors, and no protest was made against their appointment. The protest against Grayson (Rec. p. 132) was in attempted revenge for his having defeated the scheme of the appellants to cut out the second trust note-holders in the faithful discharge of the duties of his trust, for which the court below thought he should be rewarded, rather than punished. The last interview the appellants, had with him, Talbott himself testifies, was a pleasant one (Rec. p. 74). He and his co-trustees were the persons whom Haller himself had selected as trustees in the deeds of trust executed by him.

The objection made below that there is no more reason or justification for arbitrarily fixing the additional strip "at 10 feet than there is for fixing it at 30 feet," is scarcely tenable under the facts of this case. A 10-foot strip was the margin contemplated in the original plan for the building. It was the air space which the material men were given to understand would be laid out outside

the building upon the south and west sides. It is the additional space agreed upon by Haller and Wood as that which should be added at the time of the deed to Duke, at the time of the negotiation for the McReynolds release, and at the time of the contract for the conveyance of the property as a whole to the proposed joint stock company; and it is the smallest space, as shown by the testimony of Mr. Hill, sufficient to relieve the situation.

As above noted, the correctness of the decree appealed from, in so far as the question of easements is concerned, is limited by the assignments of error, as well as by the authorities cited and the discussion presented in the appellants' brief, to the easements of light and air, and, since the other easements allowed by the decree could not exist without carrying with them the light and air also allowed, the discussion as to them would seem to be purely academic, in so far as concerns the case at bar. So long as the 10-foot strip is preserved for the areaways, the cement walk, the approaches to the coal cellars, the porches on every floor of the building, etc., no practical question can arise as to the access of light and air over that strip.

The decree below, certainly in so far as the appeals in Nos. 359 and 439 are concerned, it is respectfully submitted, should be affirmed. Upon the appeal in No. 358, the appellees do not desire to be heard.

J. J. DARLINGTON,
JESSE E. POTBURY,
For Appellees.

APPENDIX.

APPELLEES' DRAFT OF DECREE BELOW.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

DAVID C. GRAYSON ET AL., TRUSTEES, *vs.* FRANK I. WOOD ET AL. } In Equity, No. 20,773.

DECREE.

This cause coming on to be heard upon the pleadings and the evidence, and having been argued by the solicitors for the parties, respectively, and duly considered, it is thereupon by the court, this — day of January, A. D. 1903, adjudged, ordered, and decreed:

That as against the defendants Frank I. Wood, H. Maurice Talbott, and Bernard A. Duke, their heirs and assigns, and as against the defendant, Nicholas T. Haller, his heirs and assigns, other than the defendants, Frederick W. McReynolds and James H. Meriwether, the property covered by the building called the Victoria Flats, together with the overhanging porticoes and other projections on the south and west sides of the said building, and the approaches to the entrances along the said sides of said building into the areas connected therewith, as properly appurtenant to the

same, is subject to the deed of trust from the defendant, Nicholas T. Haller, to the defendants, Brainard H. Warner and Louis D. Wine, trustees, of January 22, 1897, recorded in Liber 2180, at folio 340, of the land records for the District of Columbia, and also to the deed of trust from the said defendant, Nicholas T. Haller, to the complainant David C. Grayson and the defendant, John C. Heald, trustees, of December 20, 1897, recorded in Liber 2291, at folio 133, of said land records, as set forth in the bill.

That as against the defendants Frederick W. McReynolds and James H. Meriwether, trustees under the deed of trust from the said Haller of the 22d day of January, A. D. 1897, described in the bill, and the holders of the promissory notes secured thereby as in said bill set forth, and as against the said Brainard H. Warner and Louis D. Wine, trustees under the deed of trust to them of the 22d day of January, 1897, and as against the holders of the promissory notes secured thereby, and the defendants, Bernard A. Duke, H. Maurice Talbott, and Frank I. Wood, the complainants are entitled to a decree for the sale of the said building, with a strip of land along the west and south sides thereof 10 feet in width, the proceeds thereof to be brought into court, to be disposed of as hereinafter provided.

That Brainard H Warner, Frederick W. McReynolds, and David C. Grayson be, and they hereby are, appointed trustees to make the said sale, and the manner of their proceedings shall be as follows:

They shall first file with the clerk of this court a bond to the United States of America, executed by them with a surety or sureties approved by the court, or by one of the justices thereof, in the penalty of ——— dollars, conditioned for the faithful performance of the trust reposed in them by this decree, or which may be reposed in them by any future order or decree in the premises;

said sale shall be at auction in front of the premises, and the said trustees shall first give notice by publication in the Evening Star newspaper, daily except Sundays and legal holidays, for ten days prior to any sale hereunder, giving notice of the time, place, manner, and terms of any such sale, which terms shall be as follows in respect to such sale by them, as hereinafter provided: One-third of the purchase money in cash, one-third in one year, and one-third in two years, or all cash at the purchaser's option, the deferred payments, if any, to be represented by the promissory notes of the purchaser, bearing date on the day of sale, with interest at the rate of ——— per cent per annum, payable semi-annually, and secured by deed of trust upon the property, or the respective parcels of property to which they relate.

It is further adjudged, ordered, and decreed that, in the distribution of the proceeds of the sale hereby authorized, after payment of the costs of the said sale and of this suit, there shall first be deposited in the registry of the court the sum of six thousand dollars, to be held as a guaranty for the protection of the notes secured by the deed of trust to the defendants McReynolds and Meriwether, and in case the holders of the said promissory notes shall, within a reasonable time after the date of this decree, cause sale to be made of the property described in their said deed of trust, if their notes shall not be paid without such sale, and if the proceeds of such sale shall not be sufficient to pay their said promissory notes in full, then there shall be further applied to their payment, out of the said six thousand dollars, and so far as may be necessary to their full payment, so much of the said six thousand dollars as shall represent the fair and full value of the said 10-foot strip on the south and west sides of the said building, the testimony to ascertain the said value to be taken by the auditor of this court, and his report thereon to be made before any

sale under this decree, this cause being hereby referred to the auditor for this purpose, and the remaining proceeds of the said sale, including such portion of the said six thousand dollars as shall remain after compliance with the foregoing provisions of this decree, shall be applied, first, to the payment of the promissory notes secured by the deed of trust to the defendants Warner and Wine until they are fully satisfied, and then to the payment of the notes secured by the deed of trust to the defendants Grayson and Heald until the same shall be fully paid and satisfied, after which any surplus shall be paid to the defendants Talbott and Wood, their representatives or assigns.

It is further adjudged, ordered, and decreed that the complainants recover of the defendants Frank I. Wood and H. Maurice Talbott their costs in this cause, to be taxed by the clerk, and that the complainants have execution therefor as at law.

Supreme Court of the United States.

Nos. 89, 90 and 439.—October Term, 1905.

89 — Brainard H. Warner and Louis D. Wine, Trustees, et al., Appellants, *vs.* David C. Grayson, Trustee, et al.

90 — H. Maurice Talbott and Frank I. Wood, Appellants, *vs.* David C. Grayson, Trustee, et al.

439 — Frank I. Wood et al., Appellants, *vs.* David C. Grayson, Trustee, et al.

Appeals from the Court of Appeals of the District of Columbia.

[January 8, 1906.]

These are appeals from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District. The bill in the original case was filed by Grayson and others against Wood, Talbott, Duke and others, for the appointment of a receiver for certain property situated in Washington, known as the Victoria Flats; also praying an injunction to restrain the sale of the property by the trustees of the first mortgage; to have an adjudication of the right of an easement alleged to be appurtenant to the property, and for the sale of the Victoria Flats and certain property adjacent thereto, for the marshalling of incumbrances and for general relief. The facts necessary to an adjudication of the case, as we view it, being principally those found in the Court of Appeals, are as follows: Mrs. Alice S. Hill was the owner of lots one and two in block forty-five of Hill's subdivision, University Park, city of Washington. A diagram of these lots is herewith given:

-E-
14th St.
40ft.
95 ft.
45 ft
10ft.
20ft.
1
2
124 ft
190 ft
W St
-N-
10ft.
66
56 ft
95 ft
95 ft.
-W-

These lots fronted 150 feet (75 feet each) on Fourteenth street, and 190 feet on Welling Place (now Douglas street). On January 13, 1897, Mrs. Hill conveyed these lots to Nicholas T. Haller. Haller intended to erect thereon an apartment house, which was subsequently placed thereon, and became known as the Victoria Flats. To enable him to build this structure, Haller negotiated a loan of $75,000, and, on January 22, 1897, executed a deed of trust of that date to B. H. Warner and Louis D. Wine, as trustees, hereinafter called the Warner trust, describing in the deed the north 120 feet of the two lots and running westwardly to the depth of 124 feet, as shown on the plat. At the same time Haller executed a deed of trust to McReynolds and Meriweather, as trustees, hereinafter known as the McReynolds trust, upon the remaining portion of said lots 1 and 2, to secure his notes to the amount of $12,315. There were no improvements on the lots 1 and 2 at the time of making these deeds of trust. Thereafter Haller erected the apartment house on the portions of lots 1 and 2, described in the deed of trust to Warner. In the erection of the building Haller had become indebted to mechanics and materialmen in the sum of $30,087.65 and in the further sum of $10,350 for borrowed money. To avoid mechanics' liens on the property and to secure the borrowed money, a second deed of trust was placed on the property by the same description contained in the Warner deed, Grayson and Heald being the trustees named therein, hereinafter known as the Grayson trust, and bears date December 20, 1897. These deeds of trust were duly recorded. When the Grayson trust was executed and delivered the building had been erected by Haller, the mortgagor. The building contained, upon the south and west sides, in connection with which an easement is said to arise, a large number of doors, windows and porches, the porches encroaching over the line of the property deeded in the McReynolds trust four feet and nine inches, and it is averred in the bill and not denied in the answers that the areaways encroach five feet. There are thirty-six windows in the west wall, nineteen in the south wall, twenty-two doors in the west wall, five doors in the south wall, four cellar windows each in the west and south walls. It was stipulated in the case when it went back for final decree in the Supreme Court as follows:

"The areaways on the west and south sides mentioned by the witness, William J. McClure, consist of excavations from the surface of the ground downward, projecting into the cement walk, and protected by wooden platforms, on grade with and forming part of the said walk, and provided with interstices or openings admitting light to the windows below.

"On the south side of the building there is one doorway or entrance, and, on the west side, four doorways or entrances, opening out on the said cement walk, and not otherwise accessible from the exterior of said building.

"On the said west wall, projecting out on the said cement walk, there are three garbage chutes for collection of garbage from the building, and

two openings into the cellar, through which the coal supply of the building is received, the said garbage chutes and coal cellars being accessible from the exterior only by means of the said cement walk."

In both deeds of trust, in addition to the conveyance of the parcels of ground described, there is the following language:

"Together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in any wise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise, however, of the parties of the first part, of, in, to or out of the said land and premises, to have and to hold the said land, premises and appurtenances unto and to the only use of the parties of the second part, the survivors of them, his heirs and assigns."

A default having been made in the payment of interest due upon the notes secured by the deeds of trust, it was arranged that Warner and Wine were to collect the rents from the building, and afterwards Woods collected the rents of the building for a while. There is considerable testimony in the record tending to show an alleged combination on the part of Wood and Talbot, who had acquired the interest of Haller, to scale down the second or Grayson and Heald trust and to prevent the property being sold advantageously, all of which we deem unnecessary to consider in determining the rights of the parties, and shall not undertake to state the details concerning the same. It appears that Haller originally intended to place the building so as to leave ample space on the west and south, between the building and the lines of the lot as covered by the trust deeds, but being notified that a space of forty feet must be left on the east of the property and twenty feet on the north side, because of restrictions in the title of the property, the building was placed practically on the lines of the premises on the west and south, as described in the deeds of trust. The porches and areaways thus necessarily encroached on the adjoining property, as hereinbefore stated. In the view we take of the case it is important to state how Wood and Talbot acquired their interest in the property. In March, 1898, Wood obtained from Haller, in exchange for an equity of Wood's in another property, an undivided one-half interest in the flats property, and Haller conveyed the premises as described in the deed of trust to Warner, together with a ten-foot strip of ground on the south and west sides of the building, (see plat), the deed being made for the same by Haller to one Duke, who executed a declaration (dated April 9, 1898,) that he held the property in trust for Haller and Wood, one-half each. About the same time an arrangement was undertaken to be made by Haller, with the knowledge of Wood, by the terms of which, upon the payment of $4,000 upon the McReynold's trust, the ten-foot strip would be released therefrom, and $4,000 was borrowed from a bank upon the security of $4,000 of the McReynold's notes, which loan, not having been paid, the release has not been obtained. On the first of April, 1899, Talbot purchased Haller's

remaining one-half interest in the Victoria Flats property, and also one-half interest in that covered by the McReynold's trust, and Wood purchased Haller's remaining one-half interest in the McReynold's equity. The purchase price paid by Talbot was $3,100, and by Wood for the remaining one-half interest in the McReynold's equity, $250. Thus Wood and Talbot became the owners of the equities of redemption in both lots.

The Supreme Court gave the Warner trust a lien upon the ten-foot strip as part of the mortgage premises, a second lien to the Grayson trust, and ordered the property sold as an entirety, at the option of the trustees appointed to sell.

When the case was in the Court of Appeals, upon appeal from the original decree of sale, that court modified the decree below in so far as it gave the Warner trust any lien upon the ten-foot strip on the south and west sides, and ordered a decree in favor of the Grayson trust upon this strip as an easement, and that the property be sold as an entirety or in parts, according to the discretion of the trustees ordered to sell. (22 App. D. C. 432.) When the case went back to the Supreme Court the modified decree of sale was entered, from which an appeal was taken to the Court of Appeals, which affirmed the decree of the Supreme Court, (24 App. D. C. 55) and these appeals were sued out to this court.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

These appeals raise practically three questions:

1st. Was the Warner trust entitled to an easement, and, if so, to what extent, in the lands on the south and west of the flats building?

2d. Was the Grayson trust entitled to a like easement in the same premises? and,

3d. Was the property properly authorized to be sold as an entirety in the discretion of the trustees?

As to the first proposition, the Supreme Court was of opinion that the Warner trust was entitled to ten feet on the south and west sides of the property. The Court of Appeals was of the opinion that as the lots were not built upon at the time when the deed of trust was executed, and it was not then known that an easement would be necessary to the enjoyment of the property as constructed, the Warner trust took only the conveyances of the land by metes and bounds, without an easement, which that court held arose from the manner in which the building and its appurtenances were subsequently constructed and used.

The record discloses that the loan secured by the Warner trust was made for the purpose of erecting a hotel or apartment building. It is established that the first purpose of the proprietor was to construct the building

so as to leave an adjacent space and way for its accommodation and use, between its outer walls and the lot lands adjacent on the west and south. This purpose was changed upon notification that restrictions in the title of the property required the building to be set back from the streets. The building was thereupon constructed by the mortgagor in the manner shown. The deed of trust was a mortgage security and Haller continued to be the owner of the property to the full extent of the lots. The building was constructed in such wise that the use of some of the adjacent property, even independent of an easement for light and air, was absolutely necessary to the use and enjoyment of the building as constructed. It did not need the expert testimony which was introduced in the case to establish the fact that if another structure should be erected, practically even with the wall of the building, it would prevent access to and greatly impair the use of the south and west sides thereof. It would require the closing of the areaways, the shutting of the windows and doors, and must necessarily greatly depreciate the value of the property. The Warner trust contained the language, (above quoted,) conveying the described premises, with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, etc., to have and to hold to the second party, their heirs and assigns. It is true that there was no building upon the property at the time when this deed of trust was executed, but it is equally true that it was within the knowledge and purpose of the parties that a building should be constructed, which would be the principal security for the money loaned. And no one disputes that when Haller constructed the building upon the property it became immediately subject to the mortgage. He was the owner of the adjacent premises, and when he abandoned the design to leave sufficient space about the building for its proper use and enjoyment, and erected it in such manner and so close to and overlapping upon other parts of his own property as to require the use of an easement therein in order to occupy the building and permit the enjoyment and use of it as constructed, we see no reason why the express language of the conveyance above quoted would not carry with the building thus constructed the improvements, ways, appurtenances, rights and privileges necessary to the enjoyment of the same. The principle upon which subsequent buildings and fixtures annexed to the realty become a part thereof for the benefit of the mortgagee is thus stated in *Butler* v. *Page*, (7 Metcalf [Mass.] 40):

"All buildings erected and fixtures placed on mortgaged premises, by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will therefore inure to the benefit of the mortgagee, so far as they increase his security for his debt; and to the same extent they enhance the value of the equity of redemption, and thereby inure to the benefit of the mortgagor. (*Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306.) There is no necessity to adopt any liberal rule

in regard to fixtures, to enable the mortgagor to remove what he has erected at his own expense; because he has the full benefit of all such improvements when he regains the estate by redemption, which he may do, simply by payment of his actual debt. The general rule of the common law, therefore, that what is fixed to the freehold becomes part of the realty, and passes with it, has its full effect in regard to things erected on the land by an owner, who subsequently mortgages the land, and also in regard to things erected by the mortgagor after the mortgage."

To the same effect is *Graney* v. *Cullen*, (23 Gratt. [Va.] 266.) Had Haller not owned the surrounding premises, but acquired the adjacent ten-foot strip with a view of remedying the fault which he had committed in putting the building flush upon the line, and constructed his building so as to make the easement necessary to its use, we think there could be no question that the easement thus acquired would inure to the benefit of the mortgagee. Such is the principle stated in *Haney* v. *Clark*, (110 Mass. 262.) In that case tenants in common owned two adjoining tracts of land on a river, the lower one subject to a mortgage. They sold the upper tract, reserving to themselves, their heirs and assigns, the right to draw water from a reservoir on the upper for the use of the lower (mortgaged) tract. The equity of redemption of one of them in the lower tract was sold and vested in A, who also acquired title in that tract through mesne conveyances under a foreclosure of the mortgages. The court held that A was vested with the title to draw water from the reservoir under the reservation. The court said: "Incorporeal rights of this description, acquired by the mortgagor subsequent to the date of the mortgage, for the permanent improvement of the estate, and annexed by the terms of the conveyance to the realty, may be considered as passing to the mortgagee by the foreclosure, to be exercised by him at his election. There is no reason why incorporeal rights and annexed to the realty should not inure to the benefit of the mortgage security in the same manner as improvements in the nature of fixtures inure. (*Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306, 310.) Until foreclosure the mortgage is deemed a lien or charge, subject to which the estate may be conveyed, improved and in other respects dealt with as the estate of the mortgagor." We cannot see that it makes any difference in principle that the easement in the present case is annexed by the mortgagor by necessity, as the result of the manner in which he has improved the property. It is not contended that, as against the McReynolds trust, created at the same time with the Warner trust, and before the erection of the building, an easement was acquired in this strip, but we are now dealing with rights in the property as between Haller and the mortgagee, and we think the granting clause quoted above included not only the improvements, ways and easements upon the property at the time, but such as became necessarily appurtenant thereto upon the adjacent property of the grantor, because of the structure which he has placed upon the premises, to the enjoyment

of which these privileges and rights are essential. As to the extent of this easement, the conduct of the parties in undertaking to acquire ten feet, for the obvious purpose of this easement, the overhanging porches, the encroaching areas, seem to us to make ten feet a reasonable width, and no more than is properly necessary. The unloading of coal, the carrying away of garbage and other necessary usages, could hardly be accomplished in a narrower space. In this view of the case we find it unnecessary to treat this as an easement, exclusively for light and air, or to enter upon a discussion of the doctrine of easements by implication. Nor is it an answer to the effect of this annexation to the property of the easement and rights resulting from the manner of improving the premises conveyed to say that Haller, as the owner, could not create an easement for himself in his own land. The question here is, what is the effect of his conveyance, and what has he added to the realty in favor of his grantee in the mortgage? We think he annexed not only the building but the rights and privileges in his adjacent land essential to its enjoyment.

2. As to the Grayson trust. In addition to the discussion already had as to the right of the Warner trust to have an easement in this strip, it is admitted that when the Grayson trust was executed the building was up, the easement was in actual use, and it is apparent had become necessary to the building as constructed. The purpose of Haller to use this part of the property for the purposes stated is manifested in what he had done, and the subsequent purchasers of the equity took with full notice not only of the language of the recorded deed of trust, but had actual notice of the condition of the property. We think this feature of the case comes clearly within the doctrine ruled in *Shepherd* v. *Pepper*, (133 U. S. 626, 650.) It is important to note in this connection that counsel for the Grayson trust do not dispute the right of the Warner trust to have a lien upon the easement in the ten-foot strip, and states that he does not desire to be heard upon that subject. The persons contesting that right (and as well the right of Grayson) in this court are Wood and Talbott, the successors of Haller, and upon the facts shown, standing in his shoes and with full notice of the necessity of this right of way or easement to the use of the property and Haller's attempt to obtain it by release from the McReynolds and Merriweather trust. It was subsequently specifically covered in the conveyance in trust for Haller and Wood to Duke, and it is admitted in the answer of Wood and Talbott that it was the original intent to so place the building as to give room about it; the rights of Wood and Talbott are no higher or better as against either Warner or Grayson than Haller's from the facts presented in this case.

Third. Was the decree right in ordering the sale of the property in its entirety in the discretion of the trustees? Sales are thus ordered in entirety when the interests of the mortgagors and incumbrancers require

it. (*Shepherd* v. *Pepper*, 133 U. S. 626, 651, and the authorities there cited.) In this case counsel for the Grayson trust states in his brief that he does not insist upon such sale as an entirety, and in the draft of a decree, as submitted by him, no such sale is provided for. In the view we have taken of this case we cannot see that the first incumbrance, the Warner trust, requires such a sale to protect that interest. There is no dispute as to the lien of the McReynolds trust upon the property described in their deed; as against it no easement is claimed. We see no reason why, with adequate protection for the McReynolds trust, in a sum to be found sufficient in the court executing the decree, to be retained out of the purchase money of the flats property with an easement in the ten-foot [redacted], the flats may not be sold with the ten-foot strip as one piece and the remainder of the property as another. Such a form of decree is suggested in the brief of the counsel for the Grayson trust, and no incumbrancer seems to object to it, and the holders of the equity of redemption insist upon a separate sale. We think it would be the fairer way to all concerned to order the sale of the property as herein indicated.

We, therefore, upon the whole case modify the decree of the Court of Appeals in respect to the Warner trust and the ten-foot strip, and as to the sale of the property as an entirety, as hereinbefore stated. In other respects the judgment of the Court of Appeals is

Affirmed.

This disposes of the appeals in Nos. 89 and 90, which were taken from the last and final decree in the Court of Appeals. The appeal in No. 439 was taken from the decree of the Court of Appeals remanding the case to the Supreme Court, which was not final, and it is therefore dismissed. The other appeals raise all the questions made in the case.

True copy.

Test:

Clerk Supreme Court, U. S.